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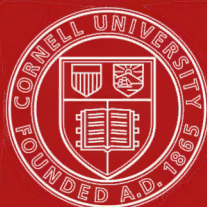
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**The principles of the law of evidence :w**



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THE PRINCIPLES  
OF THE  
LAW OF EVIDENCE

WITH ELEMENTARY RULES FOR CONDUCTING  
THE EXAMINATION  
AND  
CROSS-EXAMINATION OF WITNESSES

*William Wadesley*  
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# THE PRINCIPLES OF EVIDENCE

## PART II.

### THE SECONDARY RULES OF EVIDENCE.

292. The secondary rules of evidence, as has been already stated, are those rules which relate to the *modus probandi*, or mode of proving the matters that require proof, (*a*) and for the most part only affect evidence *in causa*. (*b*) The fundamental principle of the common law on this subject is, that the best evidence must be given—a maxim the general meaning of which has been explained in a former part of this work. (*c*) In certain cases, however, peculiar forms of proof are either prescribed or authorized by statute. We propose to treat the whole matter in the following order:

1. Direct and circumstantial evidence.
2. Presumptive evidence, Presumptions, and Fictions of law.
3. Primary and Secondary evidence.
4. Derivative evidence in general.
5. Evidence supplied by the acts of third parties.

(*a*) *Supra*, § 249.

(*c*) Bk. I, pt. §§ 87 *et seq.*

(*b*) Bk. I, pt. I, § 86.

6. Opinion evidence.
7. Self-regarding evidence.
8. Evidence rejected on grounds of public policy
9. Authority of Res judicata.
10. Quantity of evidence required.

## CHAPTER I

## DIRECT AND CIRCUMSTANTIAL EVIDENCE.

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293. All judicial evidence is either direct or circumstantial. By "direct evidence" is meant when the principal fact, or *factum probandum*, is attested directly by witnesses, things, or documents. To all other forms the term "circumstantial evidence" is applied; which may be defined, that modification of indirect evidence, whether by witnesses, things, or documents, which the law deems sufficiently proximate to a principal fact or *factum probandum*, to be receivable as evidentiary of it.<sup>1</sup> And this also is of two kinds, conclusive and pre-

<sup>1</sup>*E.g.*, the law does not require, in order to justify the influence of legal guilt, in cases of circumstantial evidence, that the existence of the inculpatory facts must be absolutely in compatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. To require the facts to be absolutely incompatible with the innocence of the accused, is to require proof of his guilt beyond the possibility of a doubt. The law requires that the facts shall not only be consistent with the guilt of the accused, but inconsistent with any other rational conclusion. A higher degree of certainty, in establishing the guilt of the accused, by means of circumstantial evidence, can not be

sumptive. "Conclusive," when the connection between the principal and evidentiary facts—the *factum probandum* and *factum probans*—is a necessary consequence of the laws of nature; as where a party accused of a crime shows that, at the moment of its commission, he was at another place, &c.; "Presumptive," when the inference of the principal fact from the evidentiary is only probable, whatever be the degree of persuasion which it may generate. (a)<sup>1</sup>

(a) *Introd. pt. I, § 27.*

required without rendering such evidence valueless. *People v. Murray*, 41 Cal. 66. Circumstantial evidence, in order to convict, must be such as will produce nearly the same degree of certainty as that which arises from direct testimony. *People v. Padell*, 42 Cal. 535; and see *Smith v. Croom*, 7 Fla. 81; where in a civil case where the question depended upon the survivorship of several persons lost by shipwreck, it was held that the certainty need not reach that point which would exclude the possibility that the fact be otherwise, but only that it would be of such a degree, included by appropriate evidence, as will produce moral conviction. *People v. Dick*, 32 Cal. 215; *People v. Crowin*, 34 Id. 201, *ante*, vol. 1, note 1; and see various constructions of which the rule stated in the text admits, p. 364; *Ballou v. Humphrey*, 8 Kan. 219; *People v. Videto*, 1 Parker (Cr.) 603; *McCan v. State*, 21 Miss. (13 Sur. & M.) 471; *State v. Williams*, 54 Mo. 170; *McGregor v. State*, 16 Ind. 9; *Schusler v. State*, 29 Ind. 394; *Findley v. State*, 5 Blatchf. 576; *Sumner v. State*, Id. 579; *United States v. Douglass*, 2 Blatchf. 207; *United States v. Martin*, 2 McLean, 256; *United States v. Cole*, 8 Id. 513, 601; *United States v. Gilbert*, 2 Sumn. 19; *United States v. Gooding*, 12 Wheat. 460-469; *Nelson v. United States*, Pet. C. C. 235; see also *Willis v. The Rationale of Circumstantial Evidence*.

<sup>1</sup> 1 Greenleaf, § 14. A conviction may be founded upon circumstantial only, if they are such as are inconsistent with the innocence of the party—if they arise out of his own conduct and remain unexplained. *The Robert Edwards*, 6 Wheat. 187.

Evidence of special facts,—Held, under the circumstances, direct and not circumstantial evidence. *United States v. Douglass*, 2 Blatchf. 207. But in a capital case, if the testi-

**294.** As regards admissibility, direct and circumstantial evidence stand, generally speaking, on the same footing. It might at first sight be imagined that the latter, especially when in a presumptive shape, is inferior or secondary to the former, and that, by analogy to the principle which excludes secondhand and postpones secondary evidence, (b) it ought to be rejected, at least when direct evidence can be procured. The law is, however, otherwise, and a little reflection will show the difference between the cases. Secondhand and secondary evidence are rejected, because they derive their force from something kept back—the non-production of which affords a presumption that it would, if produced, make against the party by whom it is withheld.<sup>1</sup> But circumstantial evidence, whether

(b) See *infra*, ch. 4 and 3.

mony before the jury does not prove the guilt of the defendant beyond a rational doubt, the fact that the defendant does not disprove circumstances proved before them, will give additional weight to such circumstances as are proved, unless the jury believe the defendant has the means of disproving them if they be false. In a capital case, if the jury be satisfied from the evidence, though circumstantial, beyond a reasonable doubt of the defendant's guilt, they may convict him. Evidence proving, or tending to prove that it was impossible that another should be the guilty person, is not absolutely necessary. *Findley v. State*, 5 Blatchf. (Ind.) 579.

<sup>1</sup> No evidence is to be received which pre-supposes greater evidence behind, in the party's possession or power. *Tayloe v. Riggs*, 1 Pet. 591. *S. P. Cloud v. Patterson*, 1 Stew. (Ala.) 394; *Newsom v. Jackson*, 26 Ga. 241; *Isabella v. Pecot*, 2 La. Ann. 387; *Rachel v. Rachel*, 4 Id. 500; *Hall v. Acklen*, 9 Id. 219; *Morton v. White*, 16 Me. 53; *Greeley v. Quimby*, 22 N. H. (2 Fost.) 335; *Cotton v. Campbell*, 3 Tex. 493; *Davis v. Robertson*, Mill (S. C.), Const. 71. Unless, of course, the non-production of the evidence be accounted for. *Hampton v. Windham*, 2 Root (Conn.) 199. *Patterson v. Doe*, 8 Blackf. (Ind.) 237; *Williams v. Jones*, 12 Ind. 561; *Union Bank v. Ellis*, 3 La. Ann. 188; *Campbell v. Wallace*, 3 Yeates (Pa.)

conclusive or presumptive, is as original in its nature as direct evidence; they are distinct modes of proof, acting as it were in parallel lines, wholly independent of each other. Suppose an indictment against A for the murder of B, the apparent cause of death being a wound given with a sword. If C saw A kill B with a sword, his evidence of the fact would be direct. If, on the other hand, a short time before the murder, D saw A walking with a drawn sword towards the spot where the body was found, and after the lapse of a time long enough to allow the murder to be committed, saw him returning with the sword bloody; these circumstances are wholly independent of the evidence of C—they derive no force whatever from it—and, coupled with others of a like nature, might generate quite as strong a persuasion of guilt. Besides, the rule that facts are provable by circumstances as well as by direct testimony, has a considerable effect in preventing guilty or dishonest parties from tampering, or making away with witnesses and other instruments of evidence, which they would be more likely to do, if they knew that the only evidence that the law would receive against them, was contained in a few easily-ascertained depositories. Still, the non-production of direct evidence which it is in the power of a party to produce, is matter of observation to a jury, (c) as, indeed, is the suppression of any sort of proof. And here it is essential to observe that the process of reasoning evidencing any fact, principal or subal-

(c) 1 Stark. Ev. 578, 3rd Edition; 340; 3 Benth. Judicial Evidence, Id. 874, 4th Edition; 2 Ev. Poth. 230.

271; Felton v. McDonald, 4 Dev. (N. C.) L. 406; Wilson v. Young, 2 Cranch C. Ct. 33; United States v. Lynn, Id. 309; Hutchinson v. Peyton, Id. 365; Patriotic Bank v. Coote, 3 Id. 169; Conway v. State Bank, 13 Ark. 48; De Taslett v. Crou-sillat, 2 Wash. 132.

ternate, may be more or less complex, longer or shorter. The inference may be drawn from one evidentiary fact, or from a combination—usually, although perhaps not very accurately, termed a chain, (*d*) of evidentiary facts. (*e*) Again, the facts from which the inference is drawn, may be either themselves proved to the satisfaction of the tribunal, or they may be merely consequences, necessary or probable, as the case may be, of other facts thus proved. (*f*)<sup>1</sup>

(*d*) "It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain; but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several  
" cords. One strand of the cord might

be insufficient to sustain the weight but three stranded together may be quite of sufficient strength." Per Pollock, C. B., in *Reg. v. Exall*, 4 F. & F. 922, 929.

(*e*) 3 Benth. Jud. Ev. 223.

(*f*) 2 Ev. Poth. 332; 3 Benth. Jud. Ev. 3.

<sup>1</sup> A presumption is, says Starkie (1 Evid. 478; 3 Id. 1235, 1246), an inference made solely by virtue of previous experience, and independently of any process of reason in the particular instance—that is to say, a presumption is the judgment or conclusion to which the mind of any person of ordinary intelligence will arrive inevitably and at once upon a statement of certain facts, before those facts are examined by the light of other facts, or of deliberate interpretation. Legal presumption must be based on facts, not on other presumptions. *Pennington v. Yell*, 11 Ark. 212. *McAlan v. McMurray*, 58 Pa. St. 289; *Richmond v. Aiken*, 25 Vt. 324; *Tanner v. Hughes*, 53 Pa. St. 289. Where presumptions are not established by law, they must be, to be valuable, weighty, precise, and consistent. The known fact upon which the presumption reposes, must draw with it the unknown fact as an almost necessary consequence. This presumption must be precise, and not susceptible of application to other circumstances besides those it is sought to establish. *Bach. v. Cohn*, 3 La. An. 103. A man's actions are facts which are supposed to be true, and as against himself or those he represents, his actions and representations will be supposed to be true. *Gales v. Christy*, 4 La. Ann. 293. They are, in all cases, evidence of the fact, and where he induces another to act on them, and can not show the contrary without bad faith, they are usually absolutely conclusive. (*Id.*) Every system of jurisprudence has

295. Direct and presumptive evidence (using the words in their technical sense) being, as has been shown, distinct modes of proof, have each their peculiar advantages and characteristic dangers. Abstractedly speaking, presumptive evidence is inferior to direct evidence. The law has enacted certain presumptions, which will be found noticed in their proper place, but in the creation of presumptions such as we are considering, all known and positive laws of nature and science, and all facts forming a part of the experience and common knowledge of the day, such as for instance in the case of a missing steamship on a voyage across the Atlantic the usual time occupied by such a voyage must be taken into the account. *Oppenheim v. Ledwolf*, 3 Sandf. Ch. 571. So, too, where a calamity, though common to all, consists of a series of successive events, separated from each other in point of time and character, and each likely to produce death upon the several victims, according to the degree of exposure to it, differences of age, sex, and physical strength might go to making up the presumption. *Smith v. Croom*, 7 Fla. 81. The Civil Code of Louisiana, in a case of this kind, adopts the rule of the French code, namely that under the age of fifteen, the presumption shall be that the oldest survived; while of those above the age of sixty, the youngest shall be presumed to have survived. Between those ages, if of different sexes, the male is presumed; and if of the same sex, the younger is presumed to be the survivor. Civil Code of Louisiana, art. 930-933; Digest of the Civil Laws of the Territory of Orleans, art. 60-63. See Greenleaf on Evidence, 1, § 30. Courts of common law, however, have generally disinclined from adopting this presumption. So in *Coye v. Leach*, 8 Metc. (Mass.) 371: where a father, seventy years old, and his daughter, thirty-three years old, being on board a steamboat that was lost at sea, both perished in the same calamity, and no special circumstances were known which tended to prove that one died before the other, held, that there was no legal presumption that either survived the other, but that it must be presumed that both died at the same instant. See also *Moehring v. Mitchell*, 1 Barb. Ch. R. 265: where a husband, wife, and daughter perished at sea by the same disaster, and there was no evidence as to who was the survivor, it was held, that while there was no presumption that the daughter survived the mother, and that *semble*, it would be presumed that the husband survived the wife.



evidence, seeing that it is in truth only a substitute for it, and an indirect mode of proving that which otherwise might not be provable at all. (*g*)<sup>1</sup> Hence a given portion of credible direct evidence, must ever be superior to an equal portion of credible presumptive evidence of the same fact. But in practice it is, from the nature of things, impossible, except in a few rare and peculiar cases to obtain more than a very limited portion of direct evidence as to any fact, especially any fact of a criminal kind; and with the probative force of such a limited portion of direct evidence, that of a chain of evidentiary facts, forming a body of presumptive proof, may well bear comparison. When proof is direct, as, for instance, where it consists of the positive testimony of one or two witnesses; the matters proved are more proximate to the issue, or, to speak correctly, are identical with the physical facts of it, and consequently leave but two chances of error—namely, those which arise from mistake or mendacity on the part of the witnesses; while in all cases of merely presump-

(*g*) Gilb. Ev. 157, 4th Ed.; R. v. of Presumptive Proof, p. 55.  
Burdett, 4 B. & A. 95, 123; Theory

<sup>1</sup> See *ante*, vol. 1, p. 65, and note 1, p. 66. Questions involving the value of circumstantial evidence will always possess a peculiar fascination for the student of jurisprudence. There are many degrees between the improbability and the demonstration of a charge, and each of these appeals with different force to differently constituted minds—may advance with examination from these degrees of disbelief, doubt, distrust, conjecture and suspicion, to financial conviction, and each step must be carefully studied. The law presumes the minds of jurymen to be at the outset utterly ignorant of circumstances, or at least of any construction of which the circumstance are capable. What the advocate is to do, then, is to so group these circumstances, to so introduce other proof, which preceded or followed them, to so display all these in their true relations to each other, and in the scale of probability, as to lead the minds of the triers carefully and surely to the truth.

tive evidence, however long and apparently complete the chain, there is a third—namely, that the inference from the facts proved may be fallacious. (*h*)<sup>1</sup> Besides, there is an anxiety felt for the detection of crimes, particularly such as are very heinous or peculiar in their circumstances, which often leads witnesses to mistake or exaggerate facts, and tribunals to draw rash inferences; and there is also natural to the human mind, a tendency to suppose greater order and conformity in things than really exists, and likewise a sort of pride or vanity in drawing conclusions from an isolated number of facts, which is apt to deceive the judgment. (*i*)

(*h*) 3 Benth. Jud. Ev. 249; Ph. & Preuvés, § 637.  
Am. Ev. 459; Bonnier, Traité des (i) Bacon, Nov. Organ. Aphor. 45;

<sup>1</sup> The second degree in evidence of the scale of certainty, consists of information derived from the relation and information of those who have had the means of acquiring actual knowledge of the fact from actual perception of the same by the senses; and upon knowledge thus derived juries must in general act. The third degree of evidence in the scale of certainty comes not directly from him who knows the fact by the perception of his senses, but from one who learns it only by the assertion of another; this is termed "hearsay" evidence. Hearsay, though accepted in common life, is not generally sufficient in a court of justice. But this rule has exceptions; *e. g.*, when the declaration is itself a fact, and a part of the *res gestæ*, the objection ceases. If the declaration illustrates a question and can be regarded as a circumstance which is part of the transaction itself, receiving importance from its connection with the circumstances, apart from speaker's credit, it is admissible. Hence, when the nature of a particular act is questioned, a contemporary declaration by the party who does the act is evidence to explain it. See *People v. Videto*, 1 Park. (N. Y.) Cr. 603; *Vardeman v. Byrne*, 8 Miss. (7 How.) 365; *Persons v. McKibben*, 5 Ind. 261; *Duffield v. Delaney*, 36 Ill. 258; *Ingram v. Plasket*, 3 Blackf. (Ind.) 450; *Crane v. Morris*, 6 Pet. 598; *Kelly v. Gage*, 6 Id. 662; *United States v. Wiggins*, 14 Id. 334; *Bank of United States v. Corcoran*, 2 Id. 121, 133; *The Jane v. United States*, 7 Cranch, 363; *Catlin v. Gilders*, 3 Ala. 536.

Sometimes, also, hasty and erroneous conclusions, in such cases, are traceable to indolence or an aversion to the patient and accurate consideration, of minute and ever-varying particulars. (*j*) Accordingly, the true meaning of the expressions in our books, that all presumptive evidence of felony should be warily pressed, admitted cautiously, &c., is, not that such evidence is incapable of producing a degree of assurance equal to that derivable from direct testimony; but that tribunals should, in dealing with presumptive evidence, be upon their guard against the peculiar dangers just described.<sup>1</sup> Such are its disadvantages. But then, on the other hand, a chain of presumptive evidence, has some decided advantages over the direct testimony of a limited number of witnesses. These are thus clearly stated by an able modern writer: (*k*) “1. By including in its composition a portion of circumstantial evidence, the aggregate mass on either side is, if mendacious, the more exposed to be disproved. Every false allegation being liable to be disproved, by any such notoriously true fact as it is incompatible with; the greater the number of such distinct false facts, the more the aggregate mass of them is exposed to be disproved: for it is the property of a mass of circumstantial evidence, in proportion to the extent of it, to bring a more and more extensive assemblage of facts under the cognizance of the judge.<sup>2</sup> 2. Of that additional mass of

R. v. Hodge, 2 Lew. C. C. 227, per Alderson, B.; Ph. & Am. Ev. 459; Burrill, Circ. Ev. 207. See further, *infra*, sect. 3, subsect. 4. (*j*) Burrill, Circ. Ev. 207. (*k*) 3 Benth. Jud. Ev. 251-2. See also Paley's Moral Philosophy, bk. 6, ch. 9.

<sup>1</sup> The life or liberty of a person can not be legally sacrificed on the ground that it is only by regarding him as guilty, that an explanation is afforded of the perpetration of a proved offense. Schusler v. State, 27 Ind. 394.

<sup>2</sup> Circumstantial evidence is only to be acted upon after it

facts, thus apt to be brought upon the carpet by circumstantial evidence, parts, more or less considerable in number, will have been brought forward by so many different deposing witnesses. But, the greater the number of deposing witnesses, the more seldom will it happen that any such concert, and that a successful one, has been produced, as is necessary to give effect to a plan of mendacious testimony, in the execution of which, in the character of deposing witnesses, divers individuals are concerned. 3. When, for giving effect to a plan of mendacious deception, direct testimony is of itself, and without any aid from circumstantial evidence, regarded as sufficient; the principal contriver sees before him a comparatively extensive circle, within which he may expect to find a mendacious witness, or an assortment of mendacious witnesses, sufficient to his purpose. But where, to the success of the plan, the fabrication or destruction of an article of circumstantial evidence is necessary, the extent of his field of choice may in this way find itself obstructed by obstacles not to be surmounted."

Lest too much reliance should be placed on these considerations, it is important that to observe that circumstantial evidence does not always consist, either of a large number of circumstances or of circumstances attested by a large number of witnesses; and, also, that the more trifling any circumstance is in itself, the greater is the probability of its being inaccurately observed and erroneously remembered. (1) But, after

(1) 19 Ho. St. Tr. 74, note.

has generated full conviction; everything calculated to illustrate a transaction should be admitted, since the conclusion depends on a number of links, which alone are weak but taken together are strong, and able to conclude. *McCann v. State*, 13 Smed. & M. (21 Miss.) 471.

every deduction made, it is impossible to deny that a conclusion, drawn from a process of well-conducted reasoning on a mass of evidence purely presumptive, may be quite as convincing, and in some cases far more convincing, than one arising from a limited portion of direct testimony. (*m*)<sup>1</sup>

(*m*) 1 East, P. C. 223; *Annesley v.* 1430, per Mouteney, B., *Paley's Mor.* The Earl of Anglesea, 17 Ho. St. Tr. Philos. bk. 6, ch. 9.

<sup>1</sup> Consult *People v. Videto*, 1 Parker, Cr. R. 603; *McGregor v. State*, 16 Ind. 9; *Sumner v. State*, 16 Blackf. 579; *Findley v. State*, 5 Id. 576; *Sumner v. State*, Id. 579; *United States v. Douglass*, 2 Id. 207; *United States v. Martin*, 2 McLean, 256; *State v. Coleman*, 22 La. An. 455; *People v. Phipps*, 39 Cal. 326; *Pitts v. State*, 43 Miss. 472; *State v. Van Winkle*, 6 Nev. 340; *Law v. State*, 33 Tex. 37; *Wrath v. Norton*, Id. 192; *Murrell v. State*, 46 Ala. 89; *United States v. The Isla de Cuba*, 2 Cliff. 295; *Bullon v. Humphrey*, 8 Kan. 219; *People v. Padillia*, 42 Cal. 535; *People v. Murray*, 41 Id. 66; *United States v. Cole*, 5 McLean, 513, 601; *United States v. Gibert*, 2 Sumn. 19; *United States v. Martin*, 2 McLean, 256; *United States v. Gooding*, 12 Wheat. 460, 469; *The Slavers (Reindeer)*, 2 Wall. 383; *Nelson v. United States*, Pet. C. Ct. 235; *La Nereyda*, 8 Wheat. 108, 173; *United States v. Douglass*, 2 Blatchf. 207; *United States v. Martin*, 2 McLean, 256. Testimony is not synonymous with "evidence." See *Harvey v. Smith*, 17 Ind. 272.

## CHAPTER II.

PRESUMPTIVE EVIDENCE, PRESUMPTIONS AND FICTIONS  
OF LAW.

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296. The nature and admissibility both of direct and presumptive evidence having been considered in the preceding chapter, we proceed in the present to examine the latter more in detail, together with the kindred subjects of presumptions and fictions of law.

297. The elements or links which compose a chain of presumptive proof, are certain moral and physical coincidences, which individually indicate the principal fact; and the probative force of the whole depends on the number, weight, independence, and consistency of those elementary circumstances.

A number of circumstances, each individually very slight, may so tally with and confirm each other, as to leave no room for doubt of the fact which they tend to establish.<sup>1</sup> "*Infirmiora (argumenta) congreganda*

<sup>1</sup> The case of William Richardson, Dumfries, A. D. 1787 (Burnett's Criminal Law of Scotland, p. 524), is cited by the author as a remarkable instance of the kind. In the autumn of 1786, a young woman, who lived with her parents in a remote district in the stewartry of Kircudbright, was one day left

sunt. . . . Singula levia sunt, et communia; universa, vero nocent, etiamsi non ut fulmine, tamen ut grandine." (b) Not to speak of greater numbers,

(b) Quint. Inst. Orat. lib. 5, c. 12.

alone in the cottage, her parents having gone out to their harvest-field. On their return home, a little after mid-day, they found their daughter murdered, with her throat cut in the most shocking manner. The circumstances in which she was found—the character of the deceased, and the appearance of the wound, all concurred in excluding any presumption of suicide; while the surgeons who examined the wound were satisfied that it had been inflicted by a sharp instrument, and by a person who must have held the instrument in his left hand. On opening the body, the deceased appeared to have been some months gone with child; and on examining the ground about the cottage, there were discovered the footsteps, seemingly of a person who had been running hastily from the cottage, and by an indirect road, through a quagmire or bog in which there were stepping-stones. It appeared, however, that the person, in his haste and confusion, had slipped his foot, and stepped into the mire, by which he must have been wet nearly to the middle of the leg. The prints of the footsteps were accurately measured, and an exact impression taken of them; and it appeared that they were those of a person who must have worn shoes, the soles of which had been newly mended, and which, as is usual in that part of the country, had iron knobs or nails in them. There were discovered also, along the track of the footsteps, and at certain intervals, drops of blood; and on a stile or small gateway near the cottage, and in the line of the footsteps, some marks resembling those of a hand which had been bloody. Not the slightest suspicion at this time attached to any particular person as the murderer; nor was it even suspected who might be the father of the child of which the girl was pregnant. At the funeral, a number of persons of both sexes attended; and the steward-depute thought it the fittest opportunity of endeavoring, if possible, to discover the murderer; conceiving, rightly, that to avoid suspicion, whoever he was, he would not, on that occasion, be absent. With this view he called together, after the interment, the whole of the men who were present, being about sixty in number. He caused the shoes of each of them to be taken off, and measured: and one of the shoes was found to resemble pretty nearly the impression of the footsteps hard by the cottage.

even two articles of circumstantial evidence,—though each taken by itself weigh but as a feather,—join them together, you will find them pressing on a delinquent

The wearer of this shoe was the schoolmaster of the parish ; which led immediately to a suspicion, that he must have been the father of the child, and had been guilty of the murder, to save his character. On a closer examination, however, of the shoe, it was discovered that it was pointed at the toe, whereas the impression of the footstep was rounded at that place. The measurement of the rest went on ; and after going through nearly the whole number, one at length was discovered, which corresponded exactly to the impression, in dimensions, shape of the foot, form of the sole, apparently newly mended, and the number and position of the knobs. William Richardson, the young man to whom the shoe belonged, on being asked where he was, the day the deceased was murdered, replied, seemingly without embarrassment, that he had been all that day employed at his master's work ; a statement which his master and fellow-servants, who were present, confirmed. This going so far to remove suspicion, a warrant of commitment was not then granted ; but some circumstances occurring a few days thereafter, having a tendency to excite it anew, the young man was apprehended and lodged in jail. On his examination, he acknowledged he was left-handed ; and, some scratches being observed on his cheek ; he said he had got them when pulling nuts in a wood, a few days before. He still adhered to what he had said, of his having been on the day of the murder employed constantly at his master's work, at some distance from the place where the deceased resided ; but, in the course of the precognition, it turned out, that he had been absent from his work about half an hour (the time being distinctly ascertained) in the course of the forenoon of that day ; that he called at a smith's shop under pretence of wanting something, which it did not appear he had any occasion for : that this smith's shop was in the way to the cottage of the deceased. A young girl, who was some hundred yards from the cottage, said that about the time the murder was committed (and which corresponded to the time that Richardson was absent from his fellow-servants), she saw a person, exactly with Richardson's dress and appearance, running hastily toward the cottage, but did not see him return, though he might have gone round by a small eminence, which would intercept him from her view, and which was the very track where the footsteps had been



with the weight of a mill-stone. (c) Thus, on an indictment for uttering a bank-note, knowing it to be counterfeit, proof that the accused uttered a counter-

(c) 3 Benth. Jud. Ev. 242.

traced. His fellow-servants now recollected that, on the forenoon of that day, they were employed, with Richardson, in driving their master's carts, and when passing by a wood which they named, Richardson said that he must run to the smith's shop, and would be back in a short time. He then left his cart under their charge; and they, having waited for him about half an hour—which one of the servants ascertained, by having at the time looked at his watch—they remarked on his return that he had been longer absent than he said he would. To which he replied, that he had stopped in the wood to gather some nuts. They observed at this time one of his stockings wet and soiled, as if he had stepped into a puddle; on which they asked where he had been? He said he had stepped into a marsh, the name of which he mentioned; on which his fellow-servants remarked, "that he must have been either drunk or mad, if he had stepped into that marsh," as there was a foot-path which went along the side of it. It then appeared, by comparing the time he was absent, with the distance of the cottage from the place where he had left his fellow-servants, that he might have gone there, committed the murder, and returned to them. A search was then made for the stockings he had worn that day. They were found concealed in the thatch of the apartment where he slept; appeared to be much soiled, and to have some drops of blood on them. The last he accounted for, by saying, first that his nose had been bleeding some days before; but it being observed that he had worn other stockings on that day, he next said, he had assisted at bleeding a horse, when he wore those stockings; but it was proved, that he had not assisted, but had stood on that occasion at such a distance, that none of the blood could have reached him. On examining the mud or sand upon the stockings, it appeared to correspond precisely with that of the mire or puddle adjoining to the cottage, and which was of a very peculiar kind, none other of the same kind being found in that neighborhood. The shoemaker was then discovered who had mended his shoes a short time before; and he spoke distinctly to the shoes of the prisoner, which were exhibited to him, as having been those he had mended. It then came out, that Richardson had been acquainted with the deceased,

feit note, amounts to nothing or next to nothing,—any person might innocently have a counterfeit note in his possession, and offer it in payment. But sup-

who was considered in the county as of weak intellect, and had on one occasion been seen with her in a wood, in circumstances that led to a suspicion, that he had had criminal conversation with her; and on being giped with having such connection with one in her situation, he seemed much ashamed and greatly hurt. It was proved further, by the person who sat next to him when the shoes were measuring, that he trembled much, and seemed a good deal agitated; and that, in the interval between that time and his being apprehended, he had been advised to fly, but his answer was, “Where can I fly to?” On the other hand, evidence was brought to show that, about the time of the murder, a boat’s crew from Ireland had landed on that part of the coast, near to the dwelling of the deceased; and it was said some of that crew might have committed the murder, though their motives for doing so, it was difficult to explain—it not being alleged that robbery was their purpose, or that anything was missed from the cottages in the neighborhood. The jury, by a great plurality of voices found him guilty. Before his execution, he confessed he was the murderer; and said it was to hide his shame that he committed the deed, knowing that the girl was with child to him. He mentioned also to the clergyman who attended him, where the knife would be found, with which he had perpetrated the murder. It was found accordingly in the place he described (under a stone in a wall), with marks of blood upon it.—Mary Ann Burdock was tried before the Recorder of Bristol, in April, 1835, for the murder of Clara Ann Smith, on the 23rd October, 1833. The deceased, who was an elderly lady, possessed of some property, went to live with the accused, who kept a lodging-house in Bristol, and was in rather bad circumstances. On the day in question, the deceased being confined to her bed, from a cold, the accused was very urgent with her to take some gruel, which she refused for some time, but at last consented. Shortly after taking it, she was seized with the symptoms of poisoning from arsenic, and died in a few hours. No medical assistance was procured, nor were her relatives made acquainted with her death by the accused; who caused her to be privately buried—telling the undertaker that an old lady had died in her house, who had no friends, and that she must bury her as the things belonging to her were worth little or

pose further proof to be adduced that, shortly before the transaction in question, he had in another place, and to another person, offered in payment another

nothing. The interment took place on the 31st October, 1833, and nothing further occurred until the month of December, 1834; when some circumstances, especially a change in the habits and mode of life of the accused, having excited suspicion, the body was disinterred on the 24th of that month, and found in a remarkably good state of preservation. An anatomical examination of the body, and a chemical analysis of a portion of it, which have received great praise in the medical and scientific worlds, detected the presence of arsenic, no less than four grains of the sulphuret having been actually procured from one portion of the intestines, while the poison in other forms was extracted from others; and the suspected party was accordingly taken into custody and brought to trial. In addition to the facts already stated, it appeared that, some days before the death of the deceased, the accused had purchased a quantity of the sulphuret of arsenic, under the groundless pretense of killing rats; and had also hired a girl to wait on the deceased, whom she especially cautioned several times to be very careful not to touch anything after the deceased, falsely representing her as "a dirty old woman, who spat in everything." It appeared also, by the testimony of this girl, that before administering the gruel to the deceased, the accused brought it into an adjoining room, where she put some pinches of a yellow powder into it, saying to the witness that her object in this was to ease the deceased from pain, but that the witness was not to tell the deceased that there was anything in the gruel, as if she knew there was, she would not take it, and would think they were going to kill her. The accused then carefully washed her hands twice. While the deceased was in the agonies of death, moaning and rolling about in her bed, the accused, who was in the room, opened a table-drawer, and took out some bits of candle and a rush-light, saying to the servant, "Only think of the old b——h having these things." This expression she repeated after the death of the deceased, on finding some other articles of small value. She cautioned the servant, on leaving her house, not to tell anything of the deceased, or that she had lived with her, or that she had ever seen her, the accused, put anything into the gruel, as people might think it curious. On this evidence Mary Ann Burdock was convicted and executed.

counterfeit note of the same manufacture, the presumption of guilty knowledge becomes strong. (*d*) And the same principle would apply in any other case,

(*d*) *R. v. Wylie, or Whiley*, 1 N. R. Green, 3 Car. & K. 209. See also *R. 92*; 2 Leach, C. L. 983; *R. v. Ball*, v. Jarvis, 1 Dears. C. C. 552, and *R. & R. 132*; 1 Campb. 324; *R. v. v. Foster*, Id. 456.

3. Jacob. Jans, A. D. 1643, Huberus, *Prælectiones Juris Civilis*, lib. 22, tit. 3, n. 4. The following case is inserted by the author as appendix to his edition, as illustrative of the views of the civilians, at least those of the Dutch school, on the subject of presumptive proof in criminal proceedings. It has been selected for the reason that, notwithstanding the antiquity of the case and the source whence it is taken, no evidence not receivable by the English law, as it stands at the present day, appears to have been adduced:

Quidam Suffridus Wiggeri dimicaverat cum alio, cui nomen Jacob. Jans; illo penès se non habente cultrum; Jacobus aliquoties Suffridum suo cultro impetierat: donec à circumstantibus ei culter extortus est, cum nemo Suffridum vidisset aut sciret esse percussum. Is exinde in eodem loco per integram ferè horam sederat in scamno quodam, nullâ de vulnere querelâ. Deinde egressus mox rediit, pileum tenens refertum suis intestinis, nec multo post extinctus est, nullâ cum alio pugnâ rixâve habitâ. Moribundus aiebat, à Jacobo se vulneratum, & hic, objectantibus quibusdam vulnus Suffrido inflictum, responderat aliis quidem, non esse tam grave vulnus; aliàs tacuerat. Post mortem Suffridi, Jacobus accusatus, negabat factum; probabat etiam, Suffridum aliquot septimanis antè, cum apud secretum vincula femoralium solvere non posset, cultro illa diffindere conatum esse, tam imprudenter, ut parum abesset quin cultrum ventri impegisset. Hoc non erat impossibile, quo minus & tunc evenire dotuisset; Curia tamen, factum peremptorium non exactè probatum adeo circumstantiis undique pressum, judicavit ut non dubitaverit, Jacobum, etsi necdum annos XX natum, omissâ questione, capitali addicere supplicio.

For further instances of convictions on purely presumptive evidence, see the cases of *Richard Patch*, Surrey Sp. Ass. 1806 (Report by Gurney); of *F. B. Courvoisier*, Sessions Papers of the Cent. Cr. Court of July, 1840; of *John Tawell*, Aylesbury Sp. Ass. 1845, Wills, Circ. Evid. 198, 3rd ed.; and those of *W. Howe*, alias *Wood*, Id. 234; and *Smith and others*, Id.

where it had been proved that the prisoner had done the act charged, and the only remaining question was whether, at the time he did it, he had a guilty knowledge of the quality of his act. (*e*)

298. It is, however, of the utmost importance to bear in mind, first, that if all the circumstances proved arise from one source, they are not independent of each other; and that an increase in the number of the circumstances, will not in such a case increase the probability of the hypothesis; (*f*) secondly, that where a number of independent circumstances point to the same conclusion, the probability of the justness of that conclusion is, not the sum of the simple probabilities of those circumstances, but the compound result of them; (*g*) and lastly, that the circumstances

(*e*) *R. v. Francis*, L. Rep., 2 C. C. 128, 131; 43 L. J., M. C. 97, 100.

(*f*) *Beccaria*, *Dei Delitti e delle Pene*, § 7; 1 Stark. Ev. 567, 3rd Ed.; Id. 851, 4th Ed.

(*g*) 1 Stark. Ev. 568, 3rd Ed.; Id. 853, 4th Ed.; 2 Ev. Poth. 342. The position, that the degree of assurance of the guilt of an accused person, derived from a long and connected chain of presumptive evidence, may equal, and in many cases far exceed, that derived from a limited portion (and in most criminal cases it must necessarily be a very limited portion), of direct testimony, is strongly illustrated by the mathematical formulæ of the calculus of probabilities, to which reference has been made in the Introduction to this work, pt. 2, § 73, note (2). Suppose 2 persons, A. and B., are charged with 2 distinct acts equally criminal—say, for instance, 2 distinct murders—and, in order to simplify the question, let us conceive the probability of the prin-

cipal fact equal in both cases. The evidence against A. is altogether direct, consisting of the positive testimony of two witnesses, of apparently equal credit, E. and F. The probability of the truth of their united testimony, depends on the values assignable to *m* and *n* in the expressions  $\frac{m^P}{m^P + n^P}$  and  $\frac{n^P}{m^P + n^P}$  in that note. Suppose, further, that the probability of the guilt of the accused, A., arising from the evidence of each of these witnesses taken singly, is to the contrary probability in the proportion of 1000:1. The effect of this is to render *m*=1000, *n*=1, and *p*=2. Substituting these values in those expressions we shall have  $\frac{m^P}{m^P + n^P} = \frac{(1000)^2}{(1000)^2 + 1} = \frac{1000000}{1000001}$ ; and  $\frac{n^P}{m^P + n^P} = \frac{1}{1000001}$ ; or, the probability of truth is to that of error as a million to unity. Return now to the

237; *The Commonwealth v. Webster*, Report by Bemis, Boston, 1850, *ante*, vol. 1, 333, note.

composing the chain must all be consistent with each other—a principle obvious in itself, and which will be further illustrated hereafter. (*h*)

**299.** The term “presumption,” in its largest and most comprehensive signification, may be defined to be an inference, affirmative or disaffirmative, of the truth or falsehood of a doubtful fact or proposition, drawn by a process of probable reasoning, from something proved or taken for granted. (*i*)<sup>1</sup> It is, however,

case of B., all the evidence against whom is purely circumstantial and presumptive. Instead of two witnesses to the fact, there are twenty-four circumstances adduced in evidence. The probability of guilt, resulting from each singly, to that of innocence, we will take as low as 2:1. We then have  $m=2$ ,  $n=1$ , and  $p=24$ . Substituting these values as before, we get

$$\frac{m^p}{m^p + n^p} = \frac{16777216}{16777216 + 1},$$

and

$$\frac{n^p}{m^p + n^p} = \frac{1}{16777216 + 1};$$

or, the probability of his guilt is to that of his innocence, in a proportion exceeding sixteen millions to unity. But instead of a large number of circumstances, each giving a very slight degree of probability, let us suppose, what is far more usual in practice, the circumstances to be fewer in number and stronger in themselves. With this view we will assume  $m=10$ ,  $n=1$ , and  $p=8$ . Substituting these values

in  $\frac{m^p}{m^p + n^p}$  and  $\frac{n^p}{m^p + n^p}$ , these expressions will become  $\frac{100'000'000}{100'000'001}$

and  $\frac{1}{100'000'001}$ ; *i. e.* the probability of the guilt of the accused will be to that of his innocence, in the proportion of a hundred millions to unity. It will, of course, be understood that

these numbers are only assumed for the purpose of illustration; but the above expressions clearly show, that, however, high the credit of an eye-witness be taken, circumstances may so accumulate as to give a probability greater than any assignable.

(*h*) *Infrà*, sect. 3, sub-sect. 2.

(*i*) “*Præsumptio nihil est aliud, quàm argumentum verisimile, communi sensu perceptum ex eo, quod plerumque fit, aut fieri intelligitur.*” *Matthæus de Crimin. ad lib. 48 Dig. tit. 15, c. 6, n. 1.* The definition of Huberus, *Præl. Jur. Civ. lib. 22, tit. 3, n. 14*, is much the same—“*Anticipatio judicii, de rebus incertis, ex eo, quod plerumque fit, percepta.*” See also *Id. n. 3.* “*Est nihil aliud præsumption, quàm opinio ex probabili ratiocinatione concepta.*” *Vinnius, Jurispr. Contr. lib. 4, cap. 36.* “*Præsumptio est probatio negotii dubii ex probabilibus argumentis.*” *G. A. Struvius, Syntag. Jur. Civ. Exercit. 28, Art. XV.* “*Præsumptio est probatio per argumenta probabilia facta.*” *Westenbergius, Principia Juris, iib. 22, tit. 3, § 21.* See also *Id. § 4.* “*Præsumptio est collectio, seu illatio probabilis, ex argumentis per rerum circumstantias, frequenter evenientibus, conjiciens.*” *Strauchius, ad Univ. Jus Privat. &c. Dissert. 25, Aphor. 33, Vœt, Ad Pand. lib. 22, tit. 3, n. 14*, says presumptions are “*Conjecturæ ex signo verisimili ad*

rarely employed in jurisprudence in this extended sense. Like "presumptive evidence," (*k*) it has there obtained a restricted legal signification; and is

probandum assumptæ; vel opiniones de re incertâ, necdum penitus probatâ."

"On peut définir la présomption, un jugement que la loi ou l'homme porte sur la vérité d'une chose, par une conséquence tirée d'une autre chose. Ces conséquences sont fondées sur ce qui arrive communément et ordinairement." Pothier, *Traité des Obligations*, Part. 4, ch. 3, sect. 2, § 839. See also Bonnier, *Traité des Preuves*, § 635. "A presumption of any fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning; and much of human knowledge on all subjects is derived from this source. . . . .

In matters that regard the conduct of men, the certainty of mathematical demonstration can not be required or expected." Per Abbott, C. J., in *R. v. Burdett*, 4 B. & A. 95, 161, 162. "Where the existence of one fact so necessarily and absolutely induces the supposition of another, that if the one is true, the other can not be false, the term presumption can not be legitimately applied." 2 *Ev. Poth.* 329. See also Locke on the *Human Understanding*, B. 4, ch. 14, § 4. The following very different definition is, however, given in an able treatise on the Law of Evidence: "A presumption may be defined to be an inference as to the existence of one fact, from the existence of some other fact, founded upon a previous experience of their connection. To constitute such a presumption, a previous experience of the connection between the known and inferred facts is essential, of such a nature that, as soon as

the existence of the one is established, admitted, or assumed, the inference as to the existence of the other immediately arises, independently of any reasoning on the subject. It also follows, from the above definition, that the inference may be either certain or not certain, but merely probable, and therefore capable of being rebutted by proof to the contrary. According to some writers, the term presumption is not strictly applicable where the inference is a necessary one, and absolutely conclusive, as where it is founded on the certain and invariable course of nature. . . . .

Such a distinction appears however to be an unnecessary one; and it may well be doubted whether the distinction be founded on sound principles. The Roman lawyers used the term in the more extensive sense. Their *præsumptio juris et de jure* was conclusive." 3 *Stark. Ev.* 927, 3rd Ed. With respect to this last observation, it is to be remarked that the *præsumptio juris et de jure* of the Roman law, derived its conclusive effects, not from the supposed force of the inference, but because the law superadded something to its own presumption. That sort of presumption is defined both by Alciatus and Menochius "*dispositio legis aliquid præsumendis, et super præsumpto, tanquam sibi comperto, statuentis.*" Alciatus de *Præs.* Pars 2, n. 3; Menochius, de *Præs.* lib. 1, quæst. 8, n. 1. "*Præsumptio juris et de jure,*" says Vinnius, *Jurisp. Contract.* lib. 4, cap. 36, "*dicitur, cum lex ipsa præsumit et simul disponit; si modò præsumptio, ac non potius juris*

(*k*) See *Introd.* pt. I, sec. 27, and *supra*, sec. 293.

used to designate an inference, affirmative or disaffirmative of the existence of some fact, drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed, or admitted, or established by legal evidence to the satisfaction of the tribunal. (*l*)

300. But the English term "presumption," as well as the Latin "*præsumptio*," has been used by jurists and lawyers in several different senses. An attentive examination of the subject will detect at least seven.

1. The original or primary sense stated in the preceding article.
2. The strict legal sense there explained.
3. A generic term including every sort of rebuttable presumption; *i. e.*, rebuttable presumptions of law, strong presumptions of fact, mixed presumptions, or masses of evidence, direct or presumptive, which shift the burden of proof to the opposite party. It is only in this sense that the well-known maxim, "*Stabitur*

*quædam constitutio dicenda est.*" And the same may be said of the conclusive presumptions of our own law, in which "the rule of law merely attaches itself to the circumstances, when proved; it is not deduced from them. It is not a rule of inference from testimony; but a rule of protection, as expedient, and for the general good." 1 Greenl. Ev. § 32, 7th Ed. The use of presumption as a generic term, applicable to certain as well as to contingent inferences, is indeed justified by the example of some other distinguished writers (Menoch. de Præs. lib. 1, quæst. 3, &c. quæst. 7, nn. 2 & 3; Titius, Jus Privat. lib. 2, c. 11, § 14, &c.); but their authority is overborne by those collected above, the number of which might easily be increased. Try the question by this test. Would it be correct to say that sexual intercourse

is presumed from parturition; or that innocence is presumed from proof of an alibi? Nor does the quality above attributed to presumptions as their essential ingredient, namely, that the inference is made without any exercise of the reasoning faculties, rest on a much better foundation. The inferring one fact from another must ever be an act of reasoning, however rapid the process, or however obvious the inference; and although the law has in some cases added to particular facts, an artificial weight beyond their natural tendency to produce belief, still many legal presumptions are only natural presumptions of fact recognized and enforced by law.

(*l*) See Domat, Lois Civiles, P. 1, liv. 3, tit. 6, Préamb. & sect. 4; 2 Ev Poth. 332.



*præsumptoni donec probetur in contrarium*,"<sup>1</sup> holds good. And here it will be necessary to advert to the language of L. C. B. Gilbert, (*m*) who says, that presumption is defined by the civilians, "*Conjectura ex certo signo proveniens, quæ alio (non) adducto pro veritate hobetur.*" This is far from correct. The above definition seems to be taken from a somewhat similar one given by Alciatus and Menochius, of presumptions of law; (*n*) but it is wholly inapplicable either to *præsumptiones juris et de jure*,—whose very nature is to exclude all proof against what they assume as true; or to those presumptions of fact which are too slight to shift the burden of proof. 4. A generic term applicable to certain as well as to contingent inferences. (*o*) 5. On the other hand, the word presumption has even been restricted to the sense of irrebuttable presumption. (*p*) 6. The popular sense of presumptuousness, arrogance, blind adventurous confidence, or unwarrantable assumption. (*q*) 7. The Latin "*præsumptio*" had, at one time at least, another

(*m*) Gilb. Evid. 156, 157, 4th Ed.

(*n*) Alciat. de Præs. Pars 3, n. 1; Menoch. de Præs. lib. 1, quæst. 8, n. 1.

(*o*) Menoch. de Præs. lib. 1, quæst. 3; & quæst. 7, nn. 2 & 3; Titius. Jus Privat. lib. 2, c. 11, § 14, &c.; 3 Stark. Ev. 927, 3rd Ed.

(*p*) Grounds and Rudiments of Law, p. 186, 2nd Ed.; Branch, Max. p. 107, 5th Ed.; and Halkerston's Max. p. 79.

(*q*) Doct. & Stud. c. 26; Litt. R. 327; Hargr. Co. Litt. 155 b, note (5); 4 & 5 Will. & M. c. 23, s. 10; 1 Geo. 1, c. 13,

s. 17, stat. 2; 19 Geo. 3, c. 56, s. 3; 11 Geo. 4 & 1 Will. 4, c. 23, s. 5; 6 & 7 Will. 4, c. 76, s. 8; 8 & 9 Vict. c. 87, s. 10. The Latin "*præsumptio*" is frequently used in this sense by Bracton

(see fol. 1 b, §§ 7 and 8; 6 a, § 5; 221 b, § 2): as also by the civilians and canonists; Mascard, de Prob. quæst. 10, nn. 1, 5 & 6; Alciat. de Præs. Pars. 2, N. 1; &c. See also the form of the commission of the peace, Dalt. Countr. Just. 16, 18; Archb. Justice of the Peace.

<sup>1</sup> Dugas v. Esteletto, 5 La. An. 560; Davenport v. Mason, 15 Mass. 85; Baalam v. State, 17 Ala. 798; Byrd v. Fleming, 4 Bibb. (Ky.) 143. Courts of equity can go no more on what is called presumptive evidence, than courts of law. Warner v Daniels, 1 Wood & M. 90.

signification. In *Leges Hen. 1 c. 10, § 1*, we find the expression, "*Præsumptio terre vel pecunie regis*;" where "*præsumptio*" is used in the sense of "*invasio*" "*intrusio*," or "*usurpatio*." (*r*) Some others will be found in *Mascard. de Prob. quæst. 10*; and Müller's note (*a*) to *Struvius, Syntag. Jur. Civ. Exercit. 28, § XV*. The confusion necessarily consequent on so many meanings for the same word, joined to the great importance and natural difficulty of the subject of judicial presumptions, fully justify *Alciatus (s)* in speaking of it, as "*Materia valde utilis et quotidiana in practicâ, sed confusa, inextricabilis ferè*."

**301.** Before proceeding further, it seems advisable to advert to certain expressions used by the civilians and canonists to indicate different kinds of proof, and the degrees of conviction resulting from them, which, although in a great degree obsolete, are not undeserving of notice. These are, "*Argumentum*," "*Indicium*," "*Signum*," "*Conjectura*," "*Suspicio*," and "*Adminiculum*." The term "*Argumentum*" included every species of inference from indirect evidence, whether conclusive or presumptive. (*t*) "*Indicium*"—"Indice," in the French law—answers to that form of circumstantial evidence in ours, where the inference is only presumptive; and was used to designate the fact giving rise to the inference, rather than the inference itself. Under this head were ranked the recent possession of stolen goods, vicinity to the scene of crime, sudden change of life or circumstances, &c. (*u*) By "*signum*" was meant indirect evidence

(*r*) See the *Ancient Laws and Institutes of England*, A.D., 1840, vol. 1, p. 519, note (*b*), and Glossary.

(*s*) *Alciat. de Præs. p. 1, n. 1.*

(*t*) See *Matthæus de Crimin. ad lib.*

48 *Dig. tit. 15, cap. 6, n. 1*; and *Vinnius, Jurisp. Contr. lib. 4, cap. 25 & 36.*

(*u*) *Mascard. de Prob. lib. 1, quæst. 15*; *Ménochius de Præs. lib. 1, quæst. 7*; *Encyclopédie Méthodique, tit. Ju*

coming under the cognizance of the senses; such as stains of blood on the person of a suspected murderer indications of terror on being charged with an offense, &c. (*v*) “*Conjectura*” and “*Suspicio*” were not so much modes of proof, as expressions denoting the strength of the persuasion generated in the mind by evidence. The former is well defined, “*Rationabile vestigium latentis veritatis, unde nascitur opinio sapientis;*” (*w*) or a slight degree of credence, caused by evidence too weak or too remote to produce belief or even suspicion. It is only in the character of “indicative” evidence that this has any place in English law. (*x*) “*Suspicio*” is a stronger term—“*Passio animi aliquid firmiter non eligentis.*” (*y*) *E.g.* A B is found murdered; and C D, a man of bad character, is known to have had an interest in his death; this might give rise to a conjecture that he was the murderer; and if in addition to this, he had, a short time before the murder, been seen near the spot where the body was found, the feeling in favor of his guilt might amount to suspicion. “*Admniculum*,” as its etymon implies, meant any sort of evidence, which is useless if standing alone, but useful to corroborate other evidence. (*z*) These distinctions may appear subtilities to us, but for many reasons they were not without their use in the systems where they are found. The decision of all questions of law and fact was, there entrusted to a single judge, one of the few limitations to whose power was, that the accused could

risprudence, Art. Indices; Bonnier, n. 14.

Traité des Preuves, §§ 14 & 636.

(*v*) Quintil. Inst. Orat. lib 3, c. 9;

Menoch. de Præs. lib, 1, quæst. 7,

nn. 31-37.

(*w*) Mascard. de Prob. quæst. 14,

(*x*) See bk. 1, pt. 1, § 93.

(*y*) Menochius de Præs. lib, 1, quæst.

8, n. 41.

(*z*) Menoch. de Præs. lib. 1, quæst.

7, nn. 57, 58, 59.

not be put to the torture, in the absence of a certain amount of evidence against him. (*a*)

**302.** In dealing with this important subject, we propose to treat it in the following order :

1. Presumptive evidence, presumptions generally, and fictions of law.
2. Presumptions of law and fact, and of mixed law and fact, usually met in practice.
3. Presumptions and presumptive evidence in criminal law.

## SECTION I.

### PRESUMPTIVE EVIDENCE, PRESUMPTIONS GENERALLY AND FICTIONS OF LAW.

**303.** It is clear that presumptive evidence, and the presumptions to which it gives rise, are not indebted for their probative force to positive law. When inferring the existence of a fact from others, courts of justice (assuming the inference properly drawn) do nothing more than apply, under the sanction of law, a process of reasoning which the mind of any intelligent being would, under similar circumstances, have applied for itself ; and the force of which rests altogether on experience and observation of the course of nature, the constitution of the human mind, the springs of human action, and the usages and habits of society. (*b*) All such inferences are called

(*a*) Decret. Gratian. lib. 5, tit. 41, cap. 6 ; Matth. de Prob. cap. 2, n. 80,

(*b*) "The presumption of a malicious intent to kill, from the deliberate use of a deadly weapon, and the presumption of aquatic habits in an animal

found with webbed feet, belong to the same philosophy, differing only in the instance, and not in the principle, of its application." 1 Greenl. Ev. § 14, 7th Ed.

by our lawyers "Presumptions of fact," or "Natural presumptions," and by the civilians, "Præsumptiones hominis;" (*c*) in order to distinguish them from others of a technical kind, more or less of which are to be found in every system of jurisprudence, and which are known by the name of "Præsumptiones juris," or "Presumptions of law." (*d*) To these two classes may be added a third, which, as partaking in some degree of the nature of each of the former, may be called "Præsumptiones mixtæ," "Mixed presumptions," or "Presumptions of mixed law and fact." And, as presumptions of fact are both unlimited in number, and from their very nature are not so strictly the object of legal science as presumptions of law, (*e*) we purpose, in accordance with the example of other writers on evidence, to deal with the latter first, together with the kindred subject of fictions of law. We shall then treat of the former, together with mixed presumptions; and the present section will conclude with a notice of conflicting presumptions.

## SUB-SECTION I.

### PRESUMPTIONS OF LAW, AND FICTIONS OF LAW.

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(*c*) Mascardus de Prob. Conclus. of nature.  
 1226, however, restricts the expression  
 "naturæ præsumptio" to presump-  
 tions derived from the ordinary course

(*d*) See Introd. pt. 2, §§ 42 & 43.  
 (*e*) Phil. & Am. Ev. 457.

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304. Presumptions, or as they are also called, "Intendments" of law, and by the civilians, "*Præsumptiones seu positiones juris*," are inferences or positions established by law, common or statute; and have been shown in the Introduction to this work, (*f*) for reasons which it is unnecessary here to repeat, to be indispensable to every well-regulated system of jurisprudence. They differ from presumptions of fact and mixed presumptions in two most important respects. 1st, that in the latter a discretion, more or less extensive, as to drawing the inference is vested in the tribunal; while in those now under consideration, the law peremptorily requires a certain inference to be made whenever the facts appear which it assumes as the basis of that inference. If, therefore, a judge directed a jury contrary to a presumption of law, a new trial was, at common law, grantable *ex debito justitiæ*; (*g*) and if a jury, or even a succession of juries disregard such a presumption, a new trial will

(*f*) *Introd.* pt. 2, §§ 42 & 43.

(*g*) *Phil. & Am. Ev.* 464; *Haire v. Wilson*, 9 B. & C. 643. Under the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66, Sched. Rule 48), a new trial would not be granted

in such a case, unless, in the opinion of the court, the alleged misdirection had occasioned some substantial wrong or miscarriage in the trial of the action.

still be granted, toties quoties, as matter of right. (*h*) But when any other species of presumption is overlooked or disregarded, the granting of a new trial has always been held to be a matter for the discretion of the court, which will be more or less liberal in this respect, according to the nature and strength of the presumption. 2nd (and here is, that the difference between the several kinds of presumptions is so strongly marked), as presumptions of law are, in reality, rules of law, and part of the law itself, the court may draw the inference whenever the requisite facts are before it, (*i*) while other presumptions, however obvious, being inferences of fact, could not, at common law, be made without the intervention of a jury.

305. The grounds of these *præsumptiones juris* are various. Some of them are natural presumptions which the law simply recognizes and enforces. Thus the legal maxim, that every one must be presumed to intend the natural consequence of his own act; (*k*) and, therefore, that he who sets fire to a building intended injury to its owner; and that he who lays poison for, or discharges loaded arms at another, intended death or bodily harm to that person; merely establishes as law, a principle to which the reason of man at once assents. But in most of the presumptions which we are now considering, the inference is only partially approved by reason,—the law, from motives of policy, attaching to the facts which give rise to it, an artificial effect beyond their natural tendency to produce belief. Thus, although, a receipt for money under hand and seal, naturally gives rise to a presumption of payment,

(*h*) Phil. & Am. Ev. 459; 1 Ph. Ev. 467, 10th Ed.; *Tindal v. Brown*, 1 T. R. 167-171.

(*i*) Steph. Plead. 391-392, 5th Ed;

1 Chitty, Plead. 221, 6th Ed.

(*k*) 3 M. & Selw. 15; 9 B. & C. 645; *R. v. Sheppard*, R. & R. 169; R. v. Farrington, Id. 207.

still it does not necessarily prove it; and the conclusive effect of such a receipt is a creature of the law. (1) So, the maxim by which a party who kills another is presumed to have done it maliciously, seems to rest partly on natural equity and partly on policy.<sup>1</sup> To these may be added a third class, in which the principle of legal expediency is carried so far, as to establish inferences not perceptible to reason at all, and perhaps even repugnant to it. Thus, when the law punishes offenses, even *mala prohibita*, on the assumption that all persons in the kingdom, whether natives or foreigners, are acquainted with the common and general statute law, it manifestly assumes that which has no real existence whatever, though the arbitrary inference may be dictated by the soundest policy.

306. A very important distinction exists among presumptions of law,—namely, that some are absolute and conclusive, called by the common lawyers *Irrebuttable presumptions*, and by the civilians *Præsumptiones juris et de jure*; while others are conditional, inconclusive, or rebuttable, and are called by the civilians *Præsumptiones juris tantum*, or simply *Præsumptiones juris*. The former kind has been most accurately defined by the civilians, “*Dispositio legis aliquid præsumentis, et super præsumpto, tanquam sibi comperto, statuentis.*” They add “*Præsumptio juris dicitur, quia lege introducta est; et de jure, quia sui super tali præ-*

(1) Gilb. Ev. 158 4th Ed.

<sup>1</sup> *Commonwealth v. Hawkins*, 3 Gray (Mass.) 463; *State v. Patterson*, 45 Vt. 308.

See meaning of the rule that the law presumes an unlawful act, unaccompanied by any justifying circumstances, to have been committed with an intent to have produced the circumstances which have ensued, was (*Roscoe Crim. Ev. 20*), considered in the Vermont case.



sumptione lex inducit firmum jus, et habet eam pro veritate." (*m*) In a word, they are inferences which the law makes so peremptorily, that it will not allow them to be overturned by any contrary proof, however strong.<sup>1</sup> Thus where a cause has once been regularly adjudicated upon by a competent tribunal, from which there is no appeal, the whole matter assumes the form of *res judicata*; and evidence will not be admitted, in subsequent proceedings between the same parties, to show that decision to be erroneous. (*n*)<sup>2</sup> An infant under the age of seven years is not only presumed incapable of committing felony, but the presumption can not be rebutted by the clearest evidence of a mischievous discretion. (*o*) So, a bond or other specialty is presumed to have been executed for good consideration, and no proof can be admitted to the contrary, (*p*) unless the instrument is impeached for fraud. (*q*) A receipt under hand and seal is conclusive evidence of the payment of money; (*r*) and in the time of the old feudal tenures it was an irrebuttable presumption

(*m*) Alcizius de Præs. Pars. 2, u. 3;  
Menochius de Præs. lib. 1, quæst. 3.  
u. 17; Poth. Obl. § 807.

(*n*) See *infra*, ch. 9.

(*o*) 1 Hale, P. C. 27-8; 4 Blackst.  
Comm. 23.

(*p*) Plowd. 308-9; 2 Stark. Ev. 930,  
3rd Ed.; Id. 747, 4th Ed.

(*q*) Stark. in loc. cit. See bk. 2, pt.  
3, § 220.

(*r*) Gilb. Ev. 158, 4th Ed.

<sup>1</sup> Greenleaf on Evidence, § 15.

<sup>2</sup> See *Miller v. McManus*, 57 Ill. 126. Judgment in a suit upon joint and several note in favor of one surety, will not bar suit against another, unless the defense in the first was an extinguishment of the cause of action, or unless the defenses are identical. *Hill v. Morse*, 61 Me. 541. Though a former suit may not operate strictly as *res adjudicata*, yet it may be referred to as an element by which a conclusion in accordance with the result may be assisted. *Hume v. Beale's Executrix*, 17 Wall. ; and see *Bemis v. Jennings*, 46 Vt. 45; *Davenport v. Hubbard*, Id. 336; *Watson v. Jones*, 11 Am. Law Reg. N. S. 430; *Bradley v. Johnson*, 49 Ga. 412.

of law, that a person under the age of twenty-one was incapable of performing knight service. (s)

307. These conclusive presumptions have varied considerably in the course of our legal history. Certain presumptions, which in earlier times were deemed absolute and irrebuttable, have, by the opinion of later judges, acting on more enlarged experience, either ranged among *præsumptiones juris tantum*, or considered as presumptions of fact to be made at the discretion of a jury. (t) On the whole, modern courts of justice are slow to recognize presumptions as irrebuttable, and are disposed rather to restrict than to extend their number. To preclude a party, by an arbitrary rule, from adducing evidence which, if received, would compel a decision in his favor, is an act which can only be justified by the clearest expediency and soundest policy; and some presumptions of this class ought never to have found their way into it.

308. *Præsumptiones juris et de jure* are not, however, without their use. On the contrary, when restrained within due limits, they exercise a very salutary effect in the administration of justice, by throwing obstacles in the way of vexatious litigation, and repressing inquiries where sound and unsuspected evidence is not likely to be obtained. Among the most useful in these respects, may be ranked the principle which upholds the authority of *res judicata*, the intendments made by the courts to support the verdict of juries,<sup>1</sup> and, as expounded in modern times, the doctrine of estoppel.

309. "Fictions of law" are closely allied to irre-

(s) Litt. sect. 103; Co. Litt. 78b.

(t) Ph. & Am. Ev. 460; 1 Phil. Ev. 469, 10th Ed.

<sup>1</sup> *Ante*, note 2, p. 433.

buttable presumptions of law. "*Fictio est legis, adversus veritatem, in re possibili, ex justâ causâ, dispositio*": (*u*) in other words, where the law, for the advancement of justice, assumes as fact, and will not allow to be disproved, something which is false, but not impossible. The difference between fictions of law and *præsumptiones juris et de jure* consists in this, that the latter are arbitrary inferences which may or may not be true; while in the case of fictions, the falsehood of the fact assumed is understood and avowed. (*x*) "*Super falso et certo fingitur, super incerto et vero præsumitur*." (*y*) Thus, the *præsumptio juris et de jure*, that infants under the age of seven years are *doli incapaces* for felonious purposes, (*z*) is probably true in general, though false in particular instances; but when, in order to give jurisdiction to the courts at Westminster, the law used to feign that a contract, which was really entered into at sea, was made in some part of England, (*a*) the assumption was avowedly false, and a fiction in the completest sense of the word.

**310.** Fictions of law, as is justly observed by Mr. Justice Blackstone, (*b*) though they may startle at first, will be found on consideration to be highly beneficial and useful. Like artificial presumptions, however, they have also their abuse; for we sometimes find them introduced into the jurisprudence of a country without adequate cause, or retained in it after

(*u*) Gothofred. Not. 3, ad lib. 22 Dig. tit. 3; Westenbergius, Principia Juris, ad lib. 22 Dig. tit. 3, § 28; Huberus, Positiones Juris, ad lib. 22 Dig. tit. 3, N. 25; Menochius de Præs. lib. 1, quæst. 8; 3 Blackst. Comm. 43, note (*b*). See also 2 Rol. 502, and Palm. 354.

(*x*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 21; Voet. ad Pand. lib. 22,

tit. 3, n. 19; Alciatus de Præs. Pars 1, n. 4.

(*y*) Gothof. Not. (3) ad lib. 22 Dig. tit. 3.

(*z*) 1 Hale, P. C. 27-28; 4 Blackst. Comm. 23.

(*a*) 3 Blackst. Comm. 107; 4 Inst. 134.

(*b*) 3 Blackst. Comm. 43.

their utility has ceased. They are invented, say the civilians, "*ad conciliandam æquitatem cum ratione et subtilitate juris*;" (*c*) and it is a well-known maxim of the common law, "*in fictione juris semper subsistit æquitas*;" (*d*) in furtherance of which principle the two following rules have been laid down.

**311.** First, fictions are only to be made for necessity, and to avoid mischief, (*e*) and, consequently, they must never be allowed to work prejudice or injury to an innocent party: (*f*) "*Fictio juris non operatur damnum vel injuriam*." (*g*) Thus, when a man seized in fee of lands marries, and makes a feoffment to another, who grants a rent-charge out of it to the feoffor and his wife, and to the heirs of the feoffor; the feoffor dies, and his wife recovers the moiety of the land for her dower by custom, she may distrain but for half of the rent charge; for although, by fiction of law, her claim of dower is above the rent, yet, if that fiction were carried so far as to allow her to distrain for the whole rent, it would work a wrong to a third person, which the law will not allow. (*h*) So, although the vouchee in a common recovery was, by fiction of law, considered tenant of the land, so far as to enable him to levy a fine to the demandant, or to accept a fine or release from him; still, as the vouchee had really nothing in the land, a fine by him to a stranger, or a fine or release to him from a stranger, was void. (*i*)

**312.** Secondly, it is said to be a rule, that the matter assumed as true must be something physically

(*c*) Voet. ad. Pand. lib. 22, tit. 3, N. 19.

(*d*) 3 Blackst. Comm. 43; Co. Litt 150a; 10 Co. 40a; 11 Co. 51a.

(*e*) 3 Co. 30a, Butler and Backer's case

(*f*) Id. 29; 11 Co. 51a; 13 Co. 21a.

(*g*) Palm. 354. See also 3 Co. 36a; 2 Rol. 502; 9 Exch. 45.

(*h*) Co. Litt. 150a.

(*i*) Id. 265b; 3 Co. 29b.

possible. (*k*) "*Lex non intendit aliquid impossibile.*" (*l*) "*Lex non cogit ad impossibilia.*" (*m*) "*Nulla impossibilia sunt præsumenda.*" (*n*) Thus, says Huberus, where a man devises his property, on condition that the devisee shall do a certain act within a limited time after the death of the devisor; until that time has expired with the condition unperformed, the deceased can not be said to have died intestate; because the condition, when performed, has a retrospective effect to the time of the death. But if the limited time be allowed to elapse with the condition unperformed, no subsequent performance of it can have relation back to the day of the death; for this would involve the absurdity, of a man who had already died intestate, being deemed to have died testate at a time subsequent to his decease. (*o*)

**313.** Fictions of law are of three kinds; affirmative or positive fictions, negative fictions, and fictions of relation. (*p*) In the case of affirmative fictions, some-

(*k*) Huberus, *Præl. Jur. Civ. lib. 22, tit. 3, n. 22*; Alciatus, *de Præs. Pars 1, n. 5*; Devot. *Inst. Canon. lib. 3, titl. 9, § 28, not. 2, 5th Ed.* "*Chescun fiction doit estre ex re possibili; ceo ne serra d'impossible, car le ley imitate nature;*" per Doddridge, J., in *Sheffeld v. Ratcliffe*, 2 *Roll. 501*. The existence of this rule has been denied, and especially by Titius (*Jus Privatum, &c. lib. 1, cap. 9, §§ 1 & 13*), who says of fictions in general, "*totus iste fictionum apparatus, non tantum non necessarius, sed inutilis ineptusque;*" and he adduces, as instances of feigned impossibilities, the 26th Constitution of the Emperor Leo, entitled, "*ut eunuchi adoptare possint;*" and also the fact that a child in ventre sa mère is susceptible of many rights, just if it had been actual-

ly born. In the latter of these cases, however, the fiction involves no impossibility, its only operation being with relation to time; and with respect to the former, it is clear from the preamble of the constitution in question, that the right to adopt given to the persons in the condition there mentioned, was conferred on them as an indulgence, without any reference to a supposed power of procreation.

(*l*) 12 *Co. 89*.

(*m*) *Co. Litt. 92a, 231b*; 9 *Co. 73a*; *Hob. 96*.

(*n*) *Co. Litt. 78b*.

(*o*) Huberus, *Præl. Jur. Civ. lib. 22, tit. 3, n. 22*.

(*p*) "*Tres constitui solent species. 1. Affirmativa, Positiva, seu Inductiva, qua aliquid ponitur seu inducitur, quod non est. 2. Negativa seu Priva*

thing is assumed to exist which in reality does not ; such as the fiction of lease, entry and ouster, in actions of ejectment, previous to the 15 & 16 Vict. c. 76 ; the old fiction, that the plaintiff in all suits on the law side of the Exchequer was accountant to the Crown ; (*q*) and the *ac etiam* clause in writs, by means of which the Court of Queen's Bench preserved its jurisdiction over matters of debt, after the passing of 13 Car. 2, c. 2, st. 2, (*r*) &c. In negative fictions, on the contrary, that which really exists is treated as if it did not. Thus, a disseisee, after his re-entry, may maintain trespass for injury done to the freehold during his disseisin, on the principle that, so far as the disseisor and his servants are concerned, the freehold must be taken never to have been divested out of the disseisee. (*s*) Fictions of relation are of four kinds : (*t*)—First, where the act of one person is taken to be the act of another ; as where the act or possession of a servant is deemed the act or possession of his master. So, where a felonious act is done by one person in the presence of others who are aiding or abetting him, the act of that one is, in contemplation of law, the act of all. (*u*) “*Qui per alium facit, per seipsum facere videtur.*” (*x*) Second, where an act done by or to one thing is taken, by relation, as done by or to another ; as where the possession of land is transferred by livery of seisin, or a mortgage of land is created by delivery of the title-

tiva, qua id, quod revera est, fingitur, ac si non esset. 3. Translativa, qua id, quod est in uno, transfertur in aliud.” Westenbergius, *Principia Juris*, lib. 22, tit. 3, § 29.

(*q*) 3 Blackst. Comm. 46.

(*r*) Id. 287, 288.

(*s*) 11 Co. 51a, *Liford's case*. See also *Barnett v. The Earl of Guildford*,

11 Exch. 19.

(*t*) “*Translatio fit. 1. A personā in personam. 2. De re ad rem. 3. De loco ad locum. 4. De tempore ad tempus.*” Westenbergius, *Principia Juris*, lib. 22, tit. 3, § 30.

(*u*) 1 Hale, P. C. 437.

(*x*) Co. Litt. 258a. See Dig. lib. 43, tit. 16, l. 1, § 12.

deeds. Third, fictions as to place; as, in the case already put, of a contract made at sea, or abroad, being treated as if made in England, and the like. (*y*) There is a curious instance of this kind of fiction in the civil law, by which Roman citizens who were made prisoners by an enemy, were on their return home supposed never to have been prisoners at all, and were entitled to civil rights as if they had not been out of their own country. (*z*) Fourth (and lastly), fictions as to time. Thus, where a feoffment was made with livery of seisin, a subsequent attornment by the tenant was held to relate back to the time of the livery. (*a*) It is on this principle, that the title of an executor or administrator to the goods of the testator or intestate, relates back to the time of his death, and does not take effect merely from the probate, or grant of the letters of administration (*b*)—an extremely useful fiction, to prevent the property of the deceased being made away with. And it is a fixed principle, that ratification has relation back to the time of the act done,—“*Omnis ratihabitio retrotrahitur et mandato æquiparatur*,” (*c*)—a maxim which has been well explained in some modern cases, (*d*) and was also known in the Roman law. (*e*) This kind of fiction is also largely to be found in the procedure of the courts, where it is every day’s practice to deliver

(*y*) 3 Blackst. Comm. 107.

(*z*) Dig. lib. 49, tit. 15, l. 12, § 6.

(*a*) 3 Co. 29a.

(*b*) See the cases on this subject collected in *Tharpe v. Stallwood*, 5 Man. & Gr. 760; also *Foster v. Bates*, 12 M. & W. 226; *Morgan v. Thomas*, 8 Exch. 302; and *Barnett v. The Earl of Guildford*, 11 Exch. 19.

(*c*) Co. Litt. 180b, 207a, 245a, 258a; 9 Co. 106a; 4 Inst. 317; 1 Wms. Saund. 264b, note (*e*), 6th Ed.;

3 B. Moore, 619; 6 Scott, N. R. 896; 2 Exch. 185 and 188; 4 Id. 790, 798; 7 H. & N. 693.

(*d*) *Wilson v. Tumman*, 6 Scott, N. R. 894, 6 Man. & Gr. 236; *Bird v. Brown*, 4 Exch. 786; *Buron v. Denman*, 2 Exch. 167; *Secretary of State in Council of India v. Kamachee Boye Sahaba*, 13 Mo. P. C. C. 22.

(*e*) Dig. lib. 46, tit. 3, l. 12, § 4; lib. 43, tit. 16, l. 1, § 14; lib. 3, tit. 5, l. 6, § 9; Cod. lib. 4, tit. 28, l. 7.

pleadings, sign judgments, and do many other acts nunc pro tunc. (*f*)<sup>1</sup>

314. The other kind of presumptions of law, which we have called Rebuttable presumptions, or *Præsumptiones juris tantum*, has been thus correctly defined by one of the civilians: "*Præsumptio juris dictur, quæ ex legibus introducta est, ac pro veritate habetur, donec probatione aut præsumptione contrariâ fortiore enervata fuerit.*" (*g*) Every word of this sentence is worthy of attention. First, like the former class, these presumptions are intendments made by law; but unlike them, they only hold good until disproved. Thus, although the law presumes all bills of exchange and promissory notes, to have been given and endorsed for good consideration, it is competent for certain parties affected by these presumptions to falsify them by evidence. (*h*)<sup>2</sup> So, the legitimacy of a child born during wedlock, may be rebutted by proof of the absence of the opportunity for sexual intercourse

(*f*) See further, on the subject of fictions generally, Finch, Law, 66; and on fictions by relation, Butler and Baker's case, 3 Co. 25a, and 2 Roll. Abr. tit. Relation, and Trespass per Relation.

(*g*) Voet ad Pand. lib. 22, tit. 3, n. 15. Another civilian, more ancient,

defines a presumption of law, "*Animi legislatoris ad verisimile applicatio, onus probandi transferens.*" Baldus, in Rubr. Cod. de Probat. n. 8.

(*h*) 3 Stark. Ev. 930, 3rd Ed.; Id. 747, 4th Ed.; Byles on Bills, ch. 10, 8th Ed.

<sup>1</sup> Says Woodworth, J., in *Low v. Little* (17 Johns. [N. Y.] 346): "... It must be remembered that, with regard to legal fictions, it is a general maxim, that in *fictione juris* subsistit æquelas, wherever it may contribute to the advancement of justice the fiction is maintained, but is never allowed to work an injury or prejudice to any party. For the attainment of substantive justice, and to prevent the failure of right, the court frequently apply this maxim."

<sup>2</sup> There can be no presumption in opposition to the facts proved. *Richie v. Putnam*, 13 Wend. 524. Positive proof to the contrary will always overcome a presumption. *Id. Whitlock v. McKechnie*, 1 Bosw. 425.



between its supposed parents. (i) <sup>1</sup> So, while the law presumes every infant between the ages of seven and fourteen, to be incapable of committing felony, as being *doli incapax*, still a mischievous discretion may be shown; for, *malitia supplet ætatem*. (k) And there are many instances of children under the age of fourteen being punished capitally. To this class also belong the well-known presumptions in favor of innocence,<sup>2</sup> and sanity,<sup>3</sup> and against fraud; the presump-

(i) See on this subject, *infra*, sect. 2, sub-sect. 3.

(k) 1 Hale, P. C. 26; 4 Blackst. Comm. 23; 12 Ass. Pl. 30.

<sup>1</sup> *Herring v. Goodson*, 43 Miss. 392.

<sup>2</sup> Or in civil cases the analogous presumptions that the law has been obeyed, *e. g.*, in an action for libel on the manager of an opera, he need not aver that he was licensed, since he will be presumed not to have violated the law. *Fry v. Bennett*, 28 N. Y. 324; 3 Bosw. 200. So a license to sell liquors will be presumed from the selling; *Smith v. Joyce*, 12 Barb. 21. So officers will be presumed, in all cases, to have done their duty. *Wood v. Terry*, 4 Lans. 80; *Cooper v. Bean*, 5 Id. 318; *Lucas v. Baptist Church*, 4 How. Pr. 353; *Hartwell v. Root*, 19 Johns. 345; *Wood v. Moorehouse*, 45 N. Y. 368; 1 Lans. 405.

<sup>3</sup> The presumption is that every man is sane. *United States v. Lawrence*, 4 Cranch C. Ct. 514; *S. P. United States v. McGlue*, 1 Curt. 1; *O'Brien v. People*, 48 Barb. (N. Y.) 274. That is to say, all persons of mature age are presumed to be sane until after inquest found, when the presumption is changed, and proof is required to show sanity. *Lilly v. Waggoner*, 27 Ill. 395. The burden of proving insanity is upon the person alleging it. *State v. Brown*, 12 Minn. 538. But it seems, when the attesting witnesses to a deed are dead there is no presumption that, if living, they would testify that the grantor was of sane mind at the time of the delivery of the deed. *Flanders v. Davis*, 19 N. H. 139. So, where death is the result either of accident or of a suicidal act, the presumption of law is against the latter. *Mallory v. Travellers' Ins. Co.*, 47 N. Y. 52. And see *post*, note to sec. 433.

An inquisition of lunacy if properly taken is but presumptive proof against persons not parties or privies. *Rippy v. Gant*, 4 Ired. (N. C.) Eq. 443. General derangement of

tion that legal acts have been performed with the solemnities required by law;<sup>1</sup> that every person discharges the duties or obligations which the law casts upon him, &c. (l)<sup>2</sup> The concluding words of the definition of this species of presumptions show that they may be rebutted by presumptive, as well as by direct evidence, and that the weaker presumption will give place to the stronger. (m)<sup>3</sup>

(l) *Infra*, sect. 2, sub-sect. 3 and 4.

(m) *Infra*, sub-sect. 3.

mind being established, the party alleging sanity must prove it; and so in cases of monomania, or insanity upon particular subjects, the same rules are applicable in respect to matters involving the sanity of the party upon the particular subject. But if the sanity be temporary it forms an exception to these general rules, so far as to vary or relax their application. *Thornton v. Appleton*, 29 Me. 298. Where the question is as to the sanity of a testator at the time of making his will, the burden is on the party denying the sanity. *Phelps v. Hartwell*, 1 Mass. 71; *Hubbard v. Hubbard*, 6 Id. 397; *Singleton's Will*, 8 Dana (Ky.) 315; *Burton v. Scott*, 3 Rand. (Va.) 399. To the contrary, *Crowinshield v. Crowinshield*, 2 Gray (Mass.) 524.

<sup>1</sup> So an officer will be presumed to have taken an acknowledgment of a deed, within the limits of his jurisdiction. *People v. Snyder*, 41 N. Y. 397; 51 Barb. 589.

<sup>2</sup> *Wood v. Terry*, 4 Lans. 80; *Cooper v. Bean*, 5 Id. 318, *Wood v. Moorehouse*, 45 N. Y. 368; *Lucas v. Baptist Church*, 4 How. Pr. 353.

<sup>3</sup> *Burrill on Circumstantial Evidence*, 60-61 And see *post* sub-section 2.

## SUB-SECTION II.

## PRESUMPTIONS OF FACT AND MIXED PRESUMPTIONS.

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315. We now return to a more particular examination of *Præsumptiones hominis*, or Presumptions of fact; in treating of which it is proposed to consider,

1. The grounds or sources whence they are derived;
2. Their probative force. We shall then briefly explain the nature of *Præsumptiones mixtæ*, or Presumptions of mixed law and fact; and, lastly, show the extent to which the discretion of juries in drawing

presumptive inferences, is controlled or reviewed by courts of law.

**316.** 1°. The grounds or sources of presumptions of fact are obviously innumerable—they are co-extensive with the facts, both physical and psychological, which may, under any circumstances whatever, become evidentiary in courts of justice; (*n*)—but, in a general view, such presumptions may be said to relate to things, persons, and the acts and thoughts of intelligent agents. (*o*) With respect to the first of these, it is an established principle that conformity with the ordinary course of nature ought always to be presumed. Thus, the order and changes of the seasons; the rising, setting, and course of the heavenly bodies, and the known properties of matter, give rise to very important presumptions relative to physical facts or things.<sup>1</sup> The same rule extends to persons. Thus, the absence of those natural qualities, powers, and faculties, which are incident to the human race in general, will never be presumed in any individual; such as the impossibility of living long without food, the power of procreation within the usual ages, the possession of the reasoning faculties, the common and ordinary understanding of man, &c. (*p*) To this head are reducible presumptions which juries are sometimes called on to make, relative to the duration of human life, the time of gestation, &c. Under the third class namely, the acts and thoughts of intelligent agents,

(*n*) “Desumitur [præsumptio] ex personis, ex causis, ex loco, ex tempore, ex qualitate, ex silentio, ex familiaritate, ex fugâ, ex negligentia, ex viciniâ, ex obscuritate, ex eventu, ex dignitate, ex ætate, ex quantitate, ex amore, ex societate, &c.” Matthæus de Probationibus, c. 2, n. 1.  
 (*o*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 17.  
 (*p*) Id.

<sup>1</sup> See an analogous class of presumptions treated under the head of judicial notice, *ante*, vol. 1, p. 408, note 1.

among others, all psychological facts; and here, most important inferences are drawn from the ordinary conduct of mankind, and the natural feelings or impulses of human nature. Thus, no man will ever be presumed to throw away his property, as, for instance, by paying money not due; (*q*) and so it is a maxim, that every one must be taken to love his own offspring more than that of another person. (*r*) Many presumptions of this kind are founded on the customs and habits of society; as, for instance, that a man to whom several sums of money are owing by another will first call in the debt of longest standing. (*s*) Nor is this confined to the human race; for similar presumptions may be derived from the instincts of animals. (*t*)

317. 2<sup>o</sup>. The vast field over which presumptive reasoning extends, must render ineffectual any attempt to reduce into definite classes according to their degree of probative force, the presumptions to which it gives rise. Some classification, however, has generally been deemed convenient; (*u*) and there is one which, on the strength of certain high authorities, seems to have become embodied into our law of evidence. "Many times," said Sir Edward Coke, (*v*) "juries together with other matter, are much induced by presumptions; whereof there be three sorts, viz., violent, probable, and light or temerary. *Violenta præsumptio* is many times *plena probatio*; *præsumptio probabilis* moveth little; but *præsumptio levis seu temeraria* moveth not at all."

(*q*) Voet. ad Pand. lib. 22, tit. 3, n. 15; Dig. lib. 22, tit. 3, l. 25.

(*r*) Co. Litt. 373a. See also 2 Inst. 564.

(*s*) Gilb. Ev. 156-158, 4th Ed.; 1 Ev. Poth. § 812; Cod. lib. 10, tit. 22, l. 3.

(*t*) Huber. Præl. Jur. Civ. lib. 22, tit. 3, n. 16; Goodeve, Evid. 52.

(*u*) A large number, taken from the works of the earlier civilians, are collected by Menochius, de Præs. lib. 1, quæst. 2.

(*v*) Co. Litt. 6b.

“*Præsumptio violenta valet in lege.*” (*x*) As an instance of violenta præsumptio, amounting to plena probatio, Sir Edward Coke, (*y*)—and in this he is followed by several other eminent authors, (*z*)—puts the case of a man who, being in a house, is run through the body with a sword, and instantly dies of that wound; whereupon another man is seen to come out of that house, with a bloody sword, no other man being at that time in the house. “This,” observes Chief Baron Gilbert, (*a*) “is a violent presumption that he is the murderer; for the blood, the weapon, and the hasty flight, are all the necessary concomitants to such horrid facts; and the next proof to the sight of the fact itself, is the proof of those circumstances that do necessarily attend such fact.” Notwithstanding the weight of authority in its favor, this illustration of violent presumption has been made the subject of much and deserved observation. If the authors just quoted mean to say, as their words imply, that there is no possible mode of reconciling the above facts with the innocence of the man who is seen coming out of the house, the proposition is monstrous! Any of the following hypotheses will reconcile them, and probably others might be suggested. First, that the deceased, with the intention of committing suicide, plunged the sword into his own body; and that the accused, not being in time to prevent him, drew out the sword, and so ran out, through confusion of mind, for surgical assistance. (*b*) Second, that the deceased and the accused both wore swords; that the deceased, in a fit of passion, attacked the accused, and that the accused, being close to the wall,

(*x*) Jenk. Cent. 2, Cas. 3.

(*y*) Co. Litt. 6b.

(*z*) 2 Hawk. P. C. c. 46, s. 42, 1 Stark. Ev. 562, 3rd Ed.; Id. 843, 4th Ed.; Gilb. Evid. 157, 4th Ed., &c.

See also note (*f*), p. 430.

(*a*) Gilb. Evid. in loc. cit.

(*b*) 3 Benth. Jud. Ev. 236; Burnett's Crim. Law. Scotl. 508.

had no retreat, and had just time enough to draw his sword, in the hope of keeping off the deceased, who, not seeing the sword in time, ran upon it and so was killed. (c) Third, that the deceased may in fact have been murdered, and that the real murderer may have escaped, leaving a sword sticking in or lying near the body, and the accused, coming in, may have seized the sword and run out to give the alarm. (d) Fourth, that the sword may have been originally used in an attack by the accused on the deceased, and wrenched from, and afterwards turned against the deceased by the accused, under danger of attack on his life by pistol or otherwise. (e) Perhaps, however, Sir Edward Coke and Chief Baron Gilbert only meant, that the above facts would constitute a sufficient *prima facie* case, to call on the accused for his defense, and, in the absence of explanation by him, would warrant the jury in declaring him guilty. (f)

**318.** The utility of the classification of presumptions of fact, into violent, probable, and light, is questionable ;

(c) 3 Benth. Jud. Ev. 236, 237.

(d) Goodeve, Evid. 32.

(e) Id.

(f) Their language seems to have been so understood by Mounteney, B., in the case of *Annesley v. The Earl of Anglesea* (17 Ho. St. Tr. 1430). Mr. Starkie, however, says, that the circumstances wholly and necessarily exclude any but *one* hypothesis. (1 Stark. Ev. 562, 3rd Ed ; Id. 844, 4th Ed.) The illustration given by Sir Edward Coke of a violent presumption is very ancient, and seems to have been a favorite both among the early civilians and the common-law lawyers. The facts stated in the text are expressly adduced by Bartolus, in the 14th century, and other writers of that

and subsequent periods, as conclusive proof of murder (Bartolus, Comment. in 2ndam partem Dig. Novi, de Furtis, 121a, Ed. Lugd. 1547); and they were deemed, in our own law, sufficient to support a counterplea to a wager of battle, and thus oust the appellee of his right to invoke the judgment of Heaven. Staundf. P. C. lib. 3, c. 15, Counterplees al Battaile; Bracton, lib. 3, fol. 137. See also Britton, fol. 14. Their inconclusiveness, however, did not escape the notice of some of the more enlightened civilians, both before and since the time of Coke. See Boerius, *Quæstiones*, 168 ; Voet. ad Pand. lib. 22, tit. 3, n. 14, &c.

(*g*) but if it be thought desirable to retain it, the following good illustration is added from a well-known work on criminal law: "Upon an indictment for stealing in a dwelling-house, if the defendant were apprehended a few yards from the outer door, with the stolen goods in his possession, it would be a violent presumption of his having stolen them; but if they were found in his lodgings some time after the larceny, and he refused to account for his possession of them, this, together with proof that they were actually stolen, would amount, not to a violent, but to a probable presumption merely; but, if the property were not found recently after the loss, as, for instance, not until sixteen months after, it would be but a light or rash presumption, and" (if it stood alone) "entitled to no weight." (*h*)<sup>1</sup>

(*g*) 2 Gr. Russ. 727. It is retained § 30, Paris, 1852.  
in Devotus, Instit. Canon, lib. 3, tit. 9, (*h*) Archb. Crim. Plead. 208, 15th Ed.

<sup>1</sup> A question of great importance to the American practicing lawyer, was discussed in *Doe d. Beanland v. Hurst* (11 Price, 475, 489-492), as to whether a deed respecting real estate will be presumed in a county where deeds were registered. The English Act, see *Id.* p. 492, for registering deeds and conveyances, in the West Riding of Yorkshire, provides that they be so registered to protect the grantee against subsequent bona fide conveyances or mortgages, and in effect is the same as the Registry Acts in the United States. In that case a presumption of a grant of coal in the West Riding was urged as arising from certain circumstances, and was resisted on the ground that the registry should determine the matter, and that there was no registry of any such grant. The omission was relied upon as effectually rebutting the presumption. The point does not appear to have been expressly decided, but to have been left to the jury by BAILEY, J. On the argument at bar, *Rex v. Long Buckby* (7 East, 45), was cited, and appears to be conclusive that such a case presents as fair a subject of presumption as any other. In *Rex v. Long Buckby*, an indenture of apprenticeship had been lost, and was sought to be proved by parol. There was no evidence that it had ever been stamped, and no registry of such stamping existed at the



**319.** A division of presumptions of fact, more accurate in principle and more useful in practice, is obtained by considering them with reference to their effect on the burden of proof, or *onus probandi*; the

stamp office, where it would have naturally existed, had there been no irregularity. But the court held that after a lapse of nearly twenty years, during which the indenture of apprenticeship had been acted upon as valid, the evidence of non-registry was not *per se* sufficient to repel the presumption that it had been properly stamped, but that it would rather presume that the stamping had been performed, and the registry in the proper office omitted by mistake. In Cowen and Hill's notes to Phillips on Evidence, it is pointed out, as throwing light upon the question as to the presuming of a deed of conveyance, where no registration of such deed exists, that the case of the stamp is much stronger as to the presumption of irregularity, than the case of the registry of a deed could be. For "this was a case where, without a stamp, the indentures would have been a nullity to all intents, and where in the regular course of things there must have been a registry. It was surely much stronger against the presumption of the omission to register a deed of conveyance. The latter are valid as against the party without registry, and the grantee being in possession, they would be valid against all the world, purchasers and mortgagees included. *Gouverneur v. Lynch*, 2 Paige, 300, 301, and cases cited. Neither are registering acts imperative, nor is there, in case of a deed, any great danger in omitting to register. It is entirely optional with the party, and if purchasers or mortgagees are uninjured by lack of constructive notice, none others can complain. Where notice alone is the object, it is given by a change of possession to the practice; and an absolute deed may ordinarily be held from the record without any danger. Indeed, this is often so in practice. And it follows that there is nothing in the omission to register necessarily inconsistent with the common presumption, which involves the previous existence and loss [of the deed] and may equally well include the non-registry." Adverse possession it seems must be shown, before any presumption will be made in favor of a claimant. *Wadsworthville School v. Meelze*, 4 Rich. 347. Permissive possession will raise no such presumption. *Roxbury v. Huston*, 37 Maine, 42.

general principles and rules of which have been explained in the first part of the present Book. (*i*) *Præsumptiones hominis*, or presumptions of fact are divided into slight and strong, according as they are or are not of sufficient weight to shift the burden of proof. (*j*) Slight presumptions, although sufficient to excite suspicion, or to produce an impression in favor of the truth of the facts they indicate, do not, when taken singly, either constitute proof or shift the burden of proof. Thus, the fact of stolen property being found in the possession of the supposed criminal, a long time after the theft, though well calculated to excite suspicion against him, is, when standing alone, insufficient even to put him on his defense. (*k*) So, where money has been stolen, and money, similar in amount and in the nature of the pieces, is found in the possession of another person; but none of the pieces are identified, and there is no other evidence against him. (*l*) And in the civil law, where a guardian who originally had no estate of his own, became opulent during the continuance of his guardianship, this fact, standing alone, was deemed insufficient to raise even a *prima facie* case of dishonesty against him; (*m*) the Code justly observing, "*nec enim pauperibus industria, vel augmentum patrimonii quod laboribus, et multis casibus quæritur, interdicendum est.*" (*n*) To this class also belong the presumption of guilt, derived from foot marks, resembling those of a particular person, being

(*i*) *Supra*, pt. 1, ch. 2.

(*j*) "*Præsumptio [hominis] rectè dividitur in leviozem, et fortiozem. Levior movet suspicionem, et judicem quodammodo inclinât; sed per se nulum habit juris effectum, nec onere probandi levât.*" Huberus, *Præl. Jur. Civ. lib. 22, tit. 3, n. 15*. See also Matth. de Prob. c. 2, nn. 1 & 5;

Westenbërgius, *Principia Juris*, lib. 12, tit. 3, §§ 26, 27.

(*k*) *Supra*, bk. 2, pt. 2.

(*l*) 1 Stark. Ev. 569, 3rd Ed.; Id. 854, 4th Ed.

(*m*) Voet. ad Pand. lib. 22, tit. 3, n. 14; 2 Ev. Poth. 345.

(*n*) Cod. lib. 5, tit. 51, l. 10.

found on the snow or ground near the scene of crime ; (o) the presumption of homicide from previous quarrels, (p) or from the accused having a pecuniary interest in the death of the deceased. (q)

320. But although presumptions of this kind are of no weight when standing alone, still they not only form important links in a chain of evidence, and frequently render complete a body of proof which would otherwise be imperfect ; but the concurrence of a large number of them may (each contributing to its individual share of probability) not only shift the onus probandi, but amount to proof of the most convincing kind. (r) "A man's having observed the ebb and flow of the tide to-day," observes an eminent divine, (s) "affords some sort of presumption, though the lowest imaginable, that it may happen again to-morrow ; but the observation of this event, for so many days, and months, and ages together, as it has been observed by mankind, gives us a full assurance that it will." Convictions, even for capital offenses, constantly take place on this kind of evidence ; (t) and the following good illustration, in a civil case, is given by Pothier from the text of the Roman law : (u) "A sister was charged with the payment of a sum of money to her brother ; after the death of the brother, there was a question, whether this was still due to his successor. Papinian decided, (v) that it ought to be presumed

(o) Mascardus de Probat, quæst. 8, nn. 21-23 ; R. v. Britton, 1 Fost. & F. 354.

(p) Domat, Lois Civiles, Part 1, liv. 3, tit. 6, Préamb.

(q) 3 Benth. Jud. Ev. 188.

(r) 1 Ev. Poth. art. 815, 816 ; Huberus, Præl. Jur. Civ. lib. 22, tit. 3, nn. 4 and 16 ; Id. Positiones Jur. sec. Pand. lib. 22, tit. 3, n. 19 ; Matth.

de Crim. ad lib. 48 Dig. tit. 15, c. 6 ; Voet. ad Pand. lib. 22, tit. 3, n. 18 ; 1 Stark. Ev. 570, 3rd Ed. ; Id. 855, 4th Ed.

(s) Butler's Analogy of Religion, Introduction.

(t) See *infra*, sect. 3, and App.

(u) 1 Ev. Poth. art. 816.

(v) "Denied," in Evans's translation of Pothier, is an obvious misprint.

that the brother had released it to his sister; and he founded the presumption of such release on three circumstances. 1. From the harmony which subsisted between the brother and the sister; 2. From the brother having lived a long time without demanding it; 3. From a great number of accounts being produced which had passed between the brother and sister upon their respective affairs, in none of which was there any mention of it. Each of these circumstances, taken separately, would only have formed a single presumption, insufficient to establish that the deceased had released the debt; but their concurrence appeared to Papinian to be sufficient proof of such release." (w)

321. Strong presumptions of fact, on the contrary, shift the burden of proof, even though the evidence to rebut them involve the proof of a negative. (x) The evidentiary fact giving rise to such a presumption, is said to be "*primâ facie* evidence" of the principal fact of which it is evidentiary. Thus, possession is *prima facie* evidence of property;<sup>1</sup> and the recent

(w) This is the law "*Procula*," which will be found Dig. lib. 22, tit. 3, l. 26. Sir W. D. Evans, in his valuable edition of Pothier, observes on this passage, that it does not sufficiently appear from the law, as given in the Digest, that the brother had lived any great length of time, or that harmony had existed between him and his sister. He seems, however, to have overlooked the phrase "*quamdiu vixit*," and the peculiar expression "*desideratum*."

(x) See *Byrne v. Boadle*, 2 H. & C. 722; *Kearney v. London & Brighton*

*Railway Company*, L. Rep., 5 Q. B. 411; S. C. (in Cam. Scac.), 6 Ib. 759. "*Præsumptio fortior vocatur, quæ determinat judicem, ut credat, rem certo modo se habere, non tamen quin sentiat, eam rem aliter se habere posse. Ideoque ejus hic est effectus, quod transferat onus probandi in adversarium, quo non probante, pro veritate habetur.*" Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 16. See also Heinec. ad Pand. Pars. 4, § 124; Matth. de Prob. cap. 2, n. 5; Westenbergius, Principia Juris, lib. 22, tit. 3, § 27.

<sup>1</sup> It is a presumption of law that every species of property found in a person's possession at his death belongs to his succession, and it devolves upon any one claiming any of such

possession of stolen goods is sufficient to call on the accused to show how he came by them; and in the event of his not doing so satisfactorily, to justify the conclusion that he is the thief who stole them. (y) So, a receipt for rent accrued due subsequently to that sued for, is *prima facie* evidence that all rent had been paid up to the time of giving the receipt—as it is unlikely that a landlord would not first call in the debt of longest standing. (z) And a beautiful instance of this species of presumption is afforded by the celebrated judgment of Solomon, who, with the view of ascertaining which of two women who laid claim to a child, was really the mother, gave orders, in their presence, for the child to be cut in two, and a part given to each; on which the true mother's natural feelings interposed, and she offered rather to abandon her claim to the child than suffer it to be put to death. (a) <sup>1</sup>

(y) See bk. 2, pt. 2.

(z) Gilb. Ev. 157, 4th Ed.

(a) 1 Kings, iii. 16.

property to establish his title beyond question. Succession of Alexander, 18 La. Ann. 337. Possession of personal property is *prima facie* evidence of ownership. *Goodwin v. Garr*, 8 Cal. 615; *Vining v. Baker*, 53 Me. 544; *Fish v. Skut*, 21 Barb. (N. Y.) 333; *Entreken v. Brown*, 32 Pa. St. 364. But the presumption of title from possession arises only when the possession proved appears to have been perfectly consistent with an unqualified ownership. A grant will not be presumed when the possession is explained by evidence, showing that it was taken in virtue of some qualified interest or estate, less than that of an absolute title. *Colvin v. Warford*, 20 Md. 357. Where property is found in possession of several individuals, the law refers the possession to him who has the title. *Lenoir v. Rainey*, 15 Ala. 667. *Govenor v. Campbell*, 17 Ala. 566; *Miller v. Fraley*, 23 Ark. 735; *Maples v. Maples*, Rice (S. C.) Ch. 300; see *Wicks v. Adirondac Co.*, 4 Thomp. 1 C. 250.

<sup>1</sup> Bien que les textes bibliques ne parlent point expressément des présomptions et que l'Ecriture sainte en fournisse très peu d'exemples, leur existence et leur admissibilité sont cependant indubitables dans le droit Judaique. Elles etaient

**322.** Presumptions of this nature are entitled to great weight, and when there is no other evidence, are generally decisive in civil cases. (b) In criminal, and

(b) Huberus, *Præl. Jur. Civ. lib. 22, tit. 3, n. 16.*

tantôt abandonnées à la prudence des juges, tantôt imposées par la loi (Comp. art. 1350, et 1353, C. Nap.). Les unes et les autres avaient lien soit en matière civile soit en matière criminelle. Le premier exemple que nous donne la Bible des présomptions abandonnées à la sagesse des juges est le jugement civil de Solomon: 11 Kings, 16. Le second exemple se rencontre dans le jugement criminel rendu par Daniel contre les accusateurs de Susanne. Daniel, xiii. 51.

Concernant présomptions imposées par la loi. Moïse déjà connaissait et édictait ces présomptions légales admises ante factum, dont Montequieu a dit. "En fait de présomption celle de la loi vaut mieux que celle de l'homme. . . . Lorsque le juge presume, les jugements deviennent arbitraires; Esprit des Lois, liv. xxix. Elles se rencontrent civilement ou criminellement: Dans la règle qui n'admet pas la vérité puisse avec certitude résulter d'une déposition, "non stabit lestis unus contra aliquem." Deut. xix. 15. Dans la règle qui veut que cette vérité se rencontre au contraire dans la gemination de deux ou trois dépositions: Sed in ore duorum aut trium lestium stabit omne verbum (Eod. Loc.). Dans la règle décrétant qu'en certains cas le serment letis de usoire devait être répété pour une vérité: "Jusjurandum écrit in medio et elle, riddere non coetus." Exod. xxii. 11.

Les présomptions étaient admises comme moyen de preuve, par le droit INDIEN.

Les lois de Manou donnent une nomenclature de certaines présomptions légales, que l'on peut diviser en quatre catégories.

Présomption de mensonge de la part des parties.

"Celui qui invoque le témoignage d'un homme qui n'était pas présent; celui qui après avoir déclaré une chose la nie; celui qui ne s'aperçoit pas que les raisons qu'il avait alléguées d'abord et celles qu'il fait valoir ensuite sont en contradiction;

Celui que, après avoir donné, certains détails, modifie son premier récit . . . ceux-là sont tous déboutés de leurs demandes" (Livre viii, stances 53, 54).

"Si le demandeur n'exprime pas les motifs de sa plainte, il doit être puni d'après la loi, par un châtiment corporel ou par une amende" (stance 58).

more especially in capital cases, a greater degree of caution is, of course, requisite, and the technical rules regulating the burden of proof are not always strictly adhered to. (c)

(c) Id. See *R. v. Hadfield*, 27 Ho. St. Tr. 1282, 1353.

Présomption de mensonge de la part des témoins.

“Le témoin auquel dans l'intervalle de sept jours après sa déposition, il survient une maladie, un accident par le feu, ou la mort d'un parent, doit être condamné à payer la dette et une amende” (Livre viii, stance 108).

Présomption de subornation de témoins.

“Celui que s'est entretenu avec des témoins dans un endroit où il ne devait pas . . . . est débouté de sa demande” (Livre viii, stance 55).

Présomption d'aquiescement à la demande l'adversaire.

“Celui qui quitte le tribunal . . . . est débouté de sa demande” (Ibid).

Les présomptions étaient admises comme moyen de preuve par le droit ATHÉNIEN.

Soit qu'elles découlassent de la loi, auquel cas elles n'admettaient aucune preuve contraire, soit qu'elles fussent laissées à la prudence du juge, et alors elles pouvaient être combattues de toutes manières.

Présomption légale.

Une seule présomption légale existait, celle résultant de la chose jugée, réputée vérité judiciaire. “De quibus prius sive privato sive publico iudicio a Iudicibus pronunciatum est, aut populus scitum fecit, de iisdem iterum magistratus Iudices ne danto, neque in suffragia mittunto, neque eorum, quæ leges non concedunt, accusare permittunto” (Demosth., adv. Timocrat).

Présomptions laissées à la prudence des juges.

Elles avaient indifféremment lieu dans les causes civiles et dans les causes criminelles.

En son troisième plaidoyer contre Aphobus, Démosthènes dit à propos des attaques dirigées contre la déposition d'Etienne: “Quod esse verum testimonium perspicue vobis omnibus probabo, non præsumptionibus, nec rationibus præsentis temporis causa confictis, sed eo, quod vobis omnibus, ut ego arbitror, justum videbitur” Plus loin à l'occasion de ses témoins attaqués par l'adversaire, Démosthènes dit encore: “Suis testibus habere fidem vos jubet, meos calumniatur et

323. The resemblance between inconclusive presumptions of law, and strong presumptions of fact, can not have escaped notice—the effect of each being to

*vera dixisse negat. Ego autem illos veros estendam præsumptionibus.*"

Au premier discours contre Onétor, pour prouver qu'Aphobus n'avait point reçu la dot de sa femme, Démosthènes invoque les présomptions. "Jam confessi initio sunt ipsi non numeratam esse dotem, nec in sua potestate habuisse Aphobum. Patet autem etiam e præsumptionibus propter ea, quæ dixi, eos debere maluisse dotem quam immisere in rem familiarem Aphobi sic periclitaturam." Et afin de démontrer que cette femme a simulé une séparation il ajoute : "Partim autem testes adducam, partim magnas inductiones firmasque præsumptiones ostendam."

A défaut de toutes preuves, les présomptions suffisaient à elles seules pour motiver une condamnation, ainsi que le déclare positivement Antiphon dans sa plaidoirie pour un Chorège. "Si qua res in occulto gesta est. Si qua nex clam comparata, procul testibus, ibi necesse est Judices accusatoremque reumque diligenter percontari, et ex amborum prædicationibus, subtili conjectura venum venari, minutissima quæque vestigia suspicionum persequi, et sic pronunciare, magis secundum probabiles præsumptiones, quam ex certa scientia."

Ce fut sans produire un seul témoin qu'Eschine fit condamner Timmarque au moyen d'inductions et de présomptions, bien que cependant cet accusé fût défendu par Démosthènes (de fals. Legat.): "Age huc assiste, et responde mihi: neque enim per imperitiam habere te negabis, quid dicas. Cum enim novas causas tanquam fabulas, easque sine testibus ad præfinitam diem accusatori vincas: ex eo constat, te esse acerrimum."

Les presumptions étaient admises comme moyen de preuve, par le droit ROMAINE.

Personne, assurément, quand il s'agit de répressions pénales surtout, ne doit être condamné à la légère, et sur de vagues soupçons; car la justice courrait, à chaque instant, le plus grand risque de prendre l'apparence pour la réalité. C'est donc avec infiniment de raison et de juridicité, que Trajan a édicté: "Nec de suspicionibus debere aliquem damnari. Satiùs enim esse impunitum relinqui facinus nocentis quam innocentem damnare" (Dig. lib. xlviii., tit. xix., lex v.). Maxime qu'on croirait tirée de l'Imitation, et que nerépudierait point l'Evangile.



assume something as true until it is rebutted; and, indeed, in the Roman law, and in other systems where the decision of both law and fact is entrusted to

Mais, lorsqu'en l'absence de preuves proprement dites, la vérité jaillit, presque évidente, de faits patents ou d'un concours de circonstances qui ne laissent, pour ainsi dire, aucune place au doute, ni même à l'erreur, force est à la justice d'accepter ces indices révélateurs, ces présomptions équipollentes aux démonstrations les plus rigoureuses, sous peine de se désarmer devant le crime et de primer l'immoralité. Aussi, les présomptions ont-elles été admises en droit romain, dans les matières civiles: "*Indicia certa quæ non jure respuuntur, non minorem probationis quam instrumenta continent fidem*" (Cod., lib. iii., tit. xvii., lex xix.). Et dans les causes criminelles: "*Sciant cuncti accusatores, eam se rem deferre in publicam notionem devere quæ munita sit idoneis testibus, vel instructa apertissimis instrumentis, vel indiciis ad probationem indubitatis, et luce clarioribus expedita*" (Cod., lib. iv., tit. xx., lex xxv.).

Les présomptions étaient de trois espèces :

1<sup>o</sup> Celles qui n'admettaient aucune preuve contraire, et que les interprètes ont appelées *juris et de jure*; comme celles tirées du serment et de la chose jugée (art. 1350 C. Nap.). "*Præsumptiones juris et de jure appellant interpretes, quoties jus præsumit aliquid, ac super eo præsumpto disponit nec admittit in contrarium probationem*" (Voët., Dig., lib. xii. tit. iii.).

Présomptions que commandait impérieusement la nécessité de mettre fin aux procès et de ne pas les rendre inextricables par la contrariété des solutions: "*Ne modus litium multiplicatus, summam atque inextricabilem faciat difficultatem; maxime si diversa pronunciarentur*" (Dig., lib. xlv., tit. ii., lex vi.).

Pour que la chose jugée existât, il fallait d'abord qu'une contestation fût définitivement tranchée par un jugement régulier, prononçant la condamnation ou l'absolution du défendeur: "*Res judicata dicitur, quæ finem controversiarum pronuntiatione judicis accipit: quod vel condemnatione vel absolutione contingit*" (Digest, lib. xlii., tit. i., lex i.).

Il fallait de plus que la chose jugée ne fût invoquée que dans les conditions rigoureusement déterminées par les textes: "*Quum quæritur hæc exceptio noceat nec ne; inspiciendum est an idem corpus sit*" (Dig., lib. xlv., tit. ii., lex xii.); "quan

a single judge, the distinction between them becomes in practice almost imperceptible. (*d*) But it must

(*d*) "Quælibet exempla fortiorum, quas diximus Præsumptionum, quatenus legibus prodita sunt, ad hanc classem" (scil. præs. jur.) "non malè re-

feruntur, si hac distinctione placeat uti." Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 18. See also Gresley, Evidence, in Eq. 483-4, 2nd Ed.

titas eadem idem jus" (lex xiii.). "Et eadem causa petendi, et eadem conditio personarum; quæ nisi omnia concurrunt alia res est" (lex xiv.). Conditions si sages, que les lois modernes n'ont pu rien en modifier: "Cum de hoc, an eadem res est quæritur, hæc spectanda sunt, personæ: idipsum de quo agitur: proxima actionis causa" (Dig., eod. tit., lex xxvii., art. 1350 Cod. Nap.).

Ces conditions remplies, la chose jugée était considérée comme vérité judiciaire: "Res judicata pro veritate habetur" (Dig., lib. 1., tit. xvii., lex ccvii.).

Vérité judiciaire respectée à ce point de n'admettre plus de critique, ni même d'appréciation, ainsi que nous l'apprend un passage de Pline (lib. i., epist. v.). L'avocat Régulus s'efforçait de compromettre Pline, en lui demandant son opinion sur un certain Modestus. Pline ayant habilement éludé ses questions, Régulus insista pour lui faire dire au moins ce qu'il pensait de l'attachement pour le prince, de cet homme qu'avait exilé Domitien. Pline alors, évitant encore de répondre invoqua ainsi la chose jugée: "Quæris, inquam quid sentiam? At ego ne interrogare quidem fas puto de quo pronunciatum est." Régulus, confondu, garda le silence, et la foule applaudit.

Quant à l'autorité du serment, elle l'emportait encore, suivant Paul, sur celle de la chose jugée: "Jusjurandum . . . majorem auctoritatem habet quam res judicata" (Dig., lib. xii., tit. ii. lex ii.).

A ces présomptions, les seules qu'habituellement indiquent les auteurs, il faut ajouter les présomptions suivantes:

Que, dix mois après la mort du père de famille, tout enfant, né de la veuve, était réputé illégitime: "Post dessem menses mortis natus, non admittetur ad legitimam hæreditatem" (Dig., lib. xxxviii., tit. xv., lex iii., n° xi.).

Que, réciproquement, était légitime l'enfant né le cent quatre vingt-deuxième jour après la mort du père: "De eo autem, qui centesimo octogesimo secundo die natus est, Hippocrates scripsit, et divus Pius pontificibus rescripsit, justo

never be lost sight of in the common law, where the functions of judge and jury are usually kept distinct.

tempore videri natum : nec videri in servitutem conceptum cum mater ipsius ante centesimum octogesimum secundum diem esset manumissa ' (Dig., Eod. loc., n° xii.).

Qu'adultère était celui-là qui, après avoir été sommé trois fois de cesser des relations suspectes, était trouvé avec la femme soupçonnée : In domo uxoris, vel in popinis, aut in suburbanis, etc. . . . " Si quis cum suspectum habet de sua uxore, ter in scriptis denunciaverit sub præsentia trium testium fide dignorum, et post invenerit eum convenientem uxori suæ in domo sua, vel uxoris, vel adulteri, vel in popinis, aut in suburbanis : sine periculo eum perimat. Si alibi inveniat, tribus testibus convocatis tradat eum judici : qui nulla alia ratione quæsitæ habet puniendi licentiam " (Cod., lib. ix., in Auth. Novell. cxvii, cap. xv.).

Qu'un individu était réellement débiteur, lorsqu'obligé, nominibus, il avait laissé passer un temps prolongé, sans user de l'exception non numeratæ pecuniæ : " Plane si quis debere se scripserit quod ei numeratum non est, de pecunia minime numerata post multum temporis exceptionem opponere non potest " (Inst. Just., lib. iii., tit. xxi. Add. Cod., lib. iv., tit. xxii., lex xiv.).

2° Celles qui admettaient la preuve contraire, que les interprètes ont appelées : Juris tantum, " et quas receptem est in judiciis vice probationum haberi ; necessitatemque probandi remittere " (Pothier, Pandect.). " Juris præsumptio dicitur, quæ ex legibus introducta est, ac pro veritate habetur donec probatione aut præsumptione contraria fortiori enervata fuerit " (Voët., Eod. loc.).

Telles étaient : La présomption de libération, résultant de la lacération de l'obligation : " Si chirographum cancellatum fuerit, licet præsumptione debitor liberatus esse videtur, in eam tamen quantitatem, quam manifestis probationibus creditor sibi abhuc deberi ostenderit, recte debitor convenitur " (Dig., lib. xxii., tit. iii., lex xxiv.) ; ou de sa remise au débiteur : " Et ideo, si debitore meo reddiderim cautionem, videtur inter lorsque la loi présume, elle donne au juge une règle fixe." nos convenisse ne peterem : profuturamque ei conventionis exceptionem placuit " (Dig., lib. ii., tit. xiv., lex ii., n° i.).

La présomption que, né le septième mois d'un mariage, un enfant était légitime : " Septimo mense nasci perfectum partum,

Unfortunately, however, the line of demarcation between the different species of presumptions has not

jam acceptum propter auctoritatem doctissimi viri Hippocratis: et ideo credendum est, eum qui ex justis nuptiis septimo mense natus est, justum filium esse" (Dig., lib. i., tit. v., lex xii.).

La présomption d'illégitimité au cas d'absence, ou de maladie du mari: "Filius eum definimus qui ex viro et uxore ejus nascitur. Sed si fingamus abfuisse maritum, verbi gratia. per decennium, reversum anniculum invenisse in domo sua: placet nobis Juliani sententia, hunc non esse mariti filium. Non tamen ferendum Julianus ait, eum, qui cum uxore sua assidue moratus nolit filium agnoscere, quasi non suum. Sed mihi videtur quod et Scævola probat, si constet maritum aliquandiu cum uxore non concubuisse, infirmitate interveniente, vel alia causa: vel si ea valetudine pater familias fuit, ut generare non possit: hunc qui in domo natus est, licet vicinis scientibus, filium non esse" (Dig., lib. i., tit. vi., lex vi.).

La présomption que chacun contracte pour ses héritiers: "Si pactum factum sit, in quo heredis mentio non fiat, quæritur an id factum sit ut ipsius duntaxat, persona eo statueretur. Sed quamvis verum sit, quod qui excipit probare debeat quod excipitur, attamen de ipso duntaxat, ac non de herede ejus quoque convenisse petitor, non qui excipit, probare debet: puta plerumque tam heredibus nostris, quam nosmetipsis cavemus" (Dig., lib. xxii., tit. iii., lex ix.).

La présomption que dans la *condictio indebiti*, celui-là a reçu légitimement, qui avoue qu'on lui a payé, en ajoutant qu'il lui était réellement dû: "Sinvero ab initio confiteatur quidem suscepisse pecunias, dicat autem non indebitas ei fuisse solutas, præsumptionem videlicet pro eo esse qui accepit nemo dubitat: qui enim solvit, nunquam ita resupinus est, ut facile suas pecunias jactet, et indebitas effundat: et maxime si ipse qui indebitas dedisse dicit, homo diligens est, et studiosus pater familias, cujus personam incredibile est in aliquo facile errasse" (Dig., lib. xxii., tit. iii., lex xxv.).

3° Celles que n'indiquait aucune loi, mais qui étaient probantes, soit insolément, lorsque leur gravité semblait suffisante, soit par leur concours, alors que légères, individuellement considérées, elles revêtaient cependant, groupées et réunies un caractère de force propre à déterminer, sinon la certitude, du moins une excessive probabilité (art. 1353, C. Nap.). "Præsumptio hominis est, cum ex ipsius negotii probabilibus quali-

always been observed with the requisite precision. We find the same presumption spoken of by judges,

tatibus ac circumstantiis aliquid inducitur, et fidem quamdam invenit aliquando majorem, aliquando minorem, donec contrarium probatum aut gravioribus præsumptionibus inductum fuerit " (Voët., Loc. sup. cit.).

L'histoire nous a conservé l'exemple d'un certain nombre de présomptions assez graves, pour avoir isolément servi de base à de remarquables jugements.

Nous n'en dirons pas autant de la présomption incroyable qui va suivre et de la solution plus incroyable encore qui en fut la conséquence.

On instruisait contre un accusé, quand, traversant le forum, un personnage considérable du nom de Servillius vint, au grand étonnement de tous, prendre place au banc des témoins et dire ; Je ne sais ce dont il s'agit, et ne connais point le prévenu, mais je crois devoir apprendre que l'ayant rencontré un certain jour dans un endroit assez resserré de la rue Laurentina, cet homme a eu la malhonnêteté de ne pas ranger son cheval pour me laisser le haut du pavé : maintenant que les juges avisent. Et sur ce, sans se donner même la peine d'entendre d'autres dépositions, les juges, subitement éclairés par ce témoignage, déclarèrent le pauvre accusé bien et dûment convaincu des méfaits qu'on lui reprochait sous ce plaisant prétexte, que celui qui ne savait point respecter les puissants devait être capable de tons les crimes.

" Tot elevatis testibus, unum, cujus nova ratione judicium ingressa auctoritas confirmata est, referam. P. Servillius consularis, censorius, triumphalis, qui majorum suorum titulis Isaurici cognomen adjecit, cum foro præteriens testes dare vidisset, loco testis constitit, ac summam inter patronorum pariter et accusatorum admirationem sic ortus est. ' Hunc ego judices qui causam dicit, cujus sit, aut quam vitam egerit, quamque merito vel injuria accusatur, ignoro ; illud tantum scio, cum occurrisset mihi Laurentina via iter facienti admodum angusto loco equo descendere noluisse : quod an aliquid ad religionem vestram pertineat ipsi æstimabitis, ego id suppressendum non putavi.' Judices reum, vix auditis testibus, damnaverunt. Valuit enim apud eos, quum amplitudo viri, tum gravis neglectæ dignitatis ejus indignatio ; eumque, qui venerari principes nesciret in quodlibet facinus procursum crediderunt " (Val. Max., lib. viii., cap. vi.).

Témoin, ce trait de Galba, adjugeant un cheval litigieux à

sometimes as a presumption of law, sometimes as a presumption of fact, sometimes as a presumption

celui des plaideurs chez lequel, ce cheval mis en liberté, retournerait ensuite : "At in jure dicendo, cum de proprietate juramenti quæreretur, levibus utrinque argumentis, et testibus, ideoque difficili conjectura veritatis, ita decrevit, ut ad locum ubi adaquari solebat, duceretur capite involuto, atque ibidem revelato, ejus esset, ad quem sponte se a potu recepisset" (Suet., Vit. Galb., n° vii.).

Et cet autre trait de Claude, reconnaissant une maternité dissimulée, en enjoignant à la mère d'épouser son fils : "Feminam non agnoscentem filium suum, dubia utrinque argumentorum fide, ad confessionem compulit indicto matrimonio juvenis" (Suet., Vit. Claud., n° xv.).

Témoin, l'acquittement des frères Clélius, trouvés profondément endormis dans un lit contigu à celui où avait été égorgé leur père : "Quum parricidii causam duo fratres Clælii dicerent, splendido Tarracinæ loco nati, quorum pater T. Clælius in cubiculo quiescens, filiis altero lecto cubantibus, erat interemptus, neque aut servus quisquam, aut liber inveniretur ad quem suspicion cædis pertineret, hoc uno nomine absoluti sunt ; quia judicibus plane factum est, illos aperto ostio inventos esse dormientes. Somnus innoxie securitatis certissimus index miseris opem tulit. Judicatum est enim, rerum naturam non recipere, ut, occiso patre, supra vulnera et cruorem ejus, quietem capere potuerunt" (Val. Max., lib. viii., cap. i., n° xiii.).

Et la condamnation de Scantinius Capitolinus, uniquement fondée sur le pudique silence et l'attitude décente du jeune homme qu'il avait voulu déshonorer : "M. Claudius Marcellus, ædilis curulis, C. Scantinio Capitolino, tribuno plebis, diem ad populum dixit quod filium suum de stupro appellasset : eoque asseverante, se cogi non posse, ut adesset, quia sacrosanctam potestatem haberet, et ob id tribunitium auxilium implorante, totum collegium tribunorum negavit, se intercedere, quo minus pudicitæ quæstio perageretur. Citatus itaque Scantinius reus, uno teste, qui tentatus erat, damnatus est. Constat juvenem productum in rostra defixo in terram vultu perseveranter tacuisse, verecundoque silentio plurimam in ultionem suam valuisse" (Val. Max., lib. vi., cap. i., n° vii.).

Comme specimen de réunion et de concordance de plusieurs présomptions on trouve au Digeste (lib. xxii., tit. iii.), la loi XVI. par laquelle, vu l'affinité des personnes—les comptes antérieurs sans mention de fidei-commis—le défaut de paiement

which juries should be advised to make, and sometimes as one which it was obligatory on them to make. (*e*)<sup>1</sup>

(*e*) Phill. & Am. Ev. 460, 461; 1 Phill. Ev. 470, 10th Ed. When such language is found in the judgments of the superior courts, it is not surprising that the proceedings of inferior ones should exhibit even greater inaccuracy and confusion. Nothing, for instance, is more common than to hear a jury told from the bench, that when stolen property is found in the possession of a party shortly after a theft, the law presumes him to be the thief;—a direction both wrong and mischievous,

—as calculated to convey to the minds of the jury the false impression, that when the possession of the stolen property has been traced to the accused, their discretionary functions are at an end. Our ablest judges tell juries in such cases, that they ought, as men of common sense, to make the presumption, and act upon it, unless it be rebutted, either by the facts as they appear in the evidence for the prosecution, or by the evidence or explanation of the accused.

—l'empereur Commode, rejeta la compensation que voulait établir une certaine Procula: "Procula magnæ quantitatis fideicommissum a fratre sibi debitum, post mortem ejus in ratione cum heredibus compensare vellet, ex diverso autem allegaretur, nunquam id a fratre, quandiu vixit, desideratum, cum variis ex causis sæpe in rationem fratris pecunias ratio Proculæ solvisset: divus Commodus, cum super eo negotio cognosceret, non admisit compensationem, quasi tacite fratri fideicommissum fuerit remissum," (Dig., lib. xxii., tit. iii., lex xxvi.).—De Gontil, "Essai Historique sur les Preuves, sous les Législations Juive, Egyptienne, Indienne, Grecques et Romaine." Paris: Durand, 1863.

<sup>1</sup> "Presumptions of fact (presumptiones facti, hominis, judicis, in the German law *unjuristische Wahrscheinlichkeiten*), which are virtually inferences, based on inductive as distinguished from deductive proof. Among these we may mention the inference of criminal intent or malice drawn from an illegal act; and the inferences of guilt drawn from attempts to escape or evade justice; from suspicious deportment when charged with guilt; from forgery of evidence; from antecedent preparations; from declarations of guilty intentions and threats; and from possession of the fruits of the offense. Presumptions of this class are of fact, and not of law, and are simply logical inductions. The process may be stated as follows: Experience tells us that certain facts, when coexisting, are the results of design; here these facts coexist; therefore, they are the result of design. The form is deductive, but the whole strain of the argument is inductive. Both major and minor

**324.** We now come to the consideration of "Mixed presumptions," or as they are sometimes called "Presumptions of mixed law and fact," and "Presumptions of fact recognized by law." These hold an intermediate place between the two former; and consist chiefly of certain presumptive inferences which from their strength, importance, or frequent occurrence, attract as it were the observation of the law; and from being constantly recommended by judges and acted on by juries, become in time as familiar to the courts as presumptions of law, and occupy nearly as important a place in the administration of justice. Some also have been either introduced or recognized by statute. They are in truth a sort of quasi *præsumptiones juris*; and like strict legal presumptions may be divided into three classes: 1. Where the inference is one which common sense would have made for itself; 2. Where an artificial weight is attached to the evidentiary facts, beyond their mere natural tendency to produce belief; and, 3. Where from motives of legal policy, juries are recommended to draw inferences which are purely artificial. The two latter classes are chiefly found where long-established rights are in danger of being defeated by technical objections, or by want of proof of what has taken place a great while ago; in which cases it is every day's practice for judges to advise juries to presume without proof, the most solemn instruments, such as charters, grants, and other public documents; as likewise all sorts of private conveyances. (*f*)

**325.** Artificial presumptions of this kind require

(*f*) *Infrà*, sect. 2, sub-sect. 5.

premises are inductive processes; and hence are processes of fact as distinguished from law." Wharton on Homicide, § 645



to be made with caution, and it must be acknowledged that the legitimate limits of the practice have often been very much overstepped. (*g*) There are in the books many cases on this subject which can not now be considered as law, and some of which even border on the ridiculous. Thus, in an action on the game laws, it was suggested that the gun with which the defendant fired was not charged with shot, but that the bird might have died in consequence of the fright; and the jury having given a verdict for the defendant the court refused a new trial. (*h*) In another case, Lord Ellenborough is reported to have cited with approbation an expression of Lord Kenyon, that, in favor of modern enjoyment, where no documentary evidence existed, he would presume two hundred conveyances if necessary. (*i*)<sup>1</sup> So, in *Wilkinson v.*

(*g*) See *Doe d. Fenwick v. Reed*, 5 East, 132<sup>1</sup>; *Gibson v. Clark*, 1 Jac. & B. & A. 232, 236-7, per Abbott, C. J.; *W. 159, 161, note (a).*  
*Harmood v. Oglander*, 8 Ves. 106, 130, (*h*) Cited by Lord Kenyon in *Wilkinson v. Payne*, 4 T. R. 468, 469.  
*note (a)*, per Lord Eldon, C.; *Day v. Williams*, 2 C. & J. 460, 461, per Bayley, B.; *Doe d. Shewen v. Wroot*, 5 (*i*) *Countess of Dartmouth v. Roberts*, 16 East, 334, 339.

<sup>1</sup> In the United States deeds have been repeatedly presumed. Twenty years' adverse possession warrants a presumption that the possessor had a deed of the property, and that all acts, necessary to give the deed effect, were done. *Brattle Square Church v. Bullard*, 2 Metc. (Mass.) 363; *Valentine v. Piper*, 22 Pick. (Mass.) 85; *Melvin v. Locks & Canals* 17 Id. 255; *White v. Loring*, 24 Id. 319; *Ryder v. Hathaway* 21 Id. 298.

So a possession of thirty years is sufficient to authorize a jury in presuming a deed. *M'Nair v. Hunt*, 5 Mo. 300. After a separate possession of more than thirty years, a deed of partition will be presumed. *Hepburn v. Auld*, 5 Cranch. 262. And so it has been held that a will may be presumed to have existed, in order to confirm the title of one holding land for many years under a deed of A., "executor of" B., A. being the only heir of B. *Maverick v. Austin*, 1 Bailey (S. C.) 59.

Payne (*j*) which was an action on a promissory note, given to the plaintiff by the defendant in consideration of his marrying the defendant's daughter, to which the defense set up was that the marriage was not a legal one, as the parties were married by license when the plaintiff was under age, and there was no consent of his parents or guardians, it appeared in evidence that both his parents were dead when the marriage was celebrated, and there was no legal guardian; but that the plaintiff's mother, who survived the father, had, when on her deathbed, desired a friend to become guardian to her son, with whose approbation the marriage took place. It also appeared that, when the plaintiff came of age, his wife was lying on her deathbed, in extremis, and that she died in three weeks afterwards; but that in her lifetime she and the plaintiff were always treated by the defendant and his family as man and wife. Upon these facts, Grose, J., left it to the jury to presume a subsequent legal marriage, which they did accordingly, and found a verdict for the plaintiff, and the court refused a new trial. (*k*) This case had been severely commented on by Sir W. D. Evans; (*l*) and, indeed, it is impossible not to assent to the observation that rulings of this kind afford a temptation to juries to trifle with their oath, by requiring them to find as true, facts which are

(*j*) 4 T. R. 468.

(*k*) These are not the only instances which might be cited. See the case of Powell v. Milbanke, Cowp. 103 (n.), where Lord Mansfield advised a jury to presume a grant from the crown, on the strength of enjoyment under two presentations stolen from the crown. That case was condemned by Lord Eldon, C., in Harwood v. Oglander, 8 Ves. 106, 130, note (*a*), and was

spoken of by Eyre, C. B., in Gibson v. Clark, 1 Jac. & W. 159, 161, note (*a*), as "presumption run mad." See, also, Doe d. Bristowe v. Pegge, 1 T. R. 758, note; and Lade v. Holford, B. N. P. 110.

(*l*) 2 Ev. Poth. 330. See, also, Gresley, Evid. in Eq. 485-6, 2nd Ed.; and per Parke, B., in Doe d. Lewis v. Davies, 2 M. & W. 511.

probably if not obviously false. (*m*) Of late years more correct views have grown up; and in several modern cases, judges have refused to direct certain artificial presumptions to be made. (*n*) When thus restrained within their legitimate limits, presumptions of this kind are not without their use. To suppose an absurdity, in order to meet the exigency of a particular case must ever be fraught with mischief; but it is evidently different when, in conformity to a settled rule of practice, juries are directed to presume the existence of ancient documents, or the destruction of formal ones; or to make other presumptions on subjects necessarily removed from ordinary comprehension, but which the rules of law require to be submitted to and determined by them.<sup>1</sup> Both judges and juries are frequently compelled, in obedience to the Statutes of Limitations, and the strict presumptions of law, to assume as true, facts which in reality are not so; and the ends of justice may render a similar course necessary, in the case of those mixed presumptions which, although not technically, are virtually made by law. Some of the most important of these presumptions have in modern times been erected by the legislature into rules of law. (*o*)

(*m*) 3 Stark. Ev. 934, 3d Ed.; Id. 754, 4th Ed.; 2 Ev. Poth. 331.

(*n*) Doe d. Fenwick v. Reed, 5 B. & A. 232; Doe d. Howson v. Waterton, 3 Id. 149; Doe d. Hammond v. Cooke, 6 Bingh. 174; Wright v.

Smithies, 10 East, 409; R. v. The Chapter of Exeter, 12 A. & E. 512.

(*o*) See 3 & 4 Will. 4, c. 42, s. 3; *infra*, sect. 2, sub-sect. 7; 2 & 3 Will. 4, cc. 71 and 100; *infra* sect. 2, sub-sect. 5.

<sup>1</sup> As to whether the presumption that a man is presumed innocent of fraud until proved guilty, is sufficient to rebut the presumption of the execution of a fraudulent deed, raised by the proof of the handwriting of an attesting witness, *Quere*. Rogers v. Shortis, 10 Grant (Up. Can.), 243; and see Eades v. Maxwell, 17 U. C. Q. B. 173; Burrill on Circumstantial Evidence, § 50.

**326.** The terms in which presumptions of fact and mixed presumptions, should be brought under the consideration of juries by the court, depend on their weight, either natural or technical. When the presumption is one which the policy of law and the ends of justice require to be made, such as the existence of moduses, and other immemorial rights, from uninterrupted modern user, the jury should be told that they ought to make the presumption, unless evidence is given to the contrary;—it should not be left to them as a matter for their discretion. (*p*) And the same rule seems to apply, where the presumption is one of much natural weight and of frequent occurrence, as where larceny is inferred from the recent possession of stolen property. (*q*) In the case of presumptions of a less stringent nature, however, such a direction would be improper; and perhaps the best general rule is, that the jury should be advised or recommended to make the presumption. (*r*) To lay down rules for all cases would of course be impossible; but the language of the courts, expressed in decided cases in regard to particular presumptions, may in general be expected to exercise considerable influence in the determination of future cases in which the like presumptions may arise. (*s*)

**327.** It has been already stated, (*t*) as a characteristic distinction between presumptions of law and presumptions of fact, either simple or mixed, that when the former are disregarded by a jury, a new trial is granted as matter of right, but that the disregard of

(*p*) *Shephard v. Payne* (in *Cam. Scac.*), 16 C. B., N. S. 132, 135; *Lawrence v. Hitch* (in *Cam. Scac.*), L. Rep., 3 Q. B. 521; *Jenkins v. Harvey*, 1 C. M. & R. 877; *Pilots of Newcastle v. Bradley*, 2 E. & B. 431. See,

however, per Lord Denman in *Brune v. Thompson*, 4 Q. B. 543, 552.

(*q*) See *suprà*, § 323, n. (*e*).

(*r*) See *R. v. Joliffe*, 3 B. & C. 54.

(*s*) *Phill. & Am. Ev.* 461; 1 *Phill. Ev.* 470, 10th Ed.

(*t*) *Suprà*, § 304.

any of the latter, however strong and obvious, is only ground for a new trial at the discretion of the court.

(u) Now, although questions of fact are the peculiar province of a jury, the courts, by virtue of their general controlling power over everything that relates to the administration of justice, (v) will usually grant a new trial when an important presumption of fact, or an important mixed presumption, has been disregarded by a jury.<sup>1</sup> But new trials will not always be granted when successive juries disregard such a presumption; and the interference of the court in this respect depends very much on circumstances. As a general rule it may be stated, that not more than one or two new trials would be granted. (w) There are, however, some mixed presumptions which the policy of the law, convenience, and justice, so strongly require to be made, that the courts will go further in order to uphold them.

(u) Phill. & Am. Ev. 459; 1 Phill. Ev. 467, 10th Ed.; Tindal v. Brown, 1 T. R. 167.

(v) Goodwin v. Gibbons, 4 Burr. 2108; Burton v. Thompson, 2 Burr. 664.

(w) Phill. & Am. Ev. 459-460. See Foster v. Steele, 3 Bing. N. C. 892; Swinnerton v. The Marquis of Stafford, 3 Taunt. 232; Foster v. Allenby, 5 Dowl. 619; Davies v. Roper, 2 Jurist, N. S. 167.

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<sup>1</sup> In an action on a promissory note it is error for which the judgment will be reversed and a new trial will be granted to refuse to charge in writing, upon request of the defendants, that the note being payable to a third person, the law presumes him to be the owner until the evidence shows that his title to the note has terminated. Turnley v. Black, 44 Ala. 159.

And so on the trial of an action for malicious prosecution the defendant's counsel having argued that the plaintiff's character was bad,—*Held*, to be error for the court to refuse to instruct the jury that the law presumed that his character was good in the absence of evidence to the contrary. Gogans v. Monroe, 31 Ga. 331.

Where a party does not attempt to remove presumptions against his character, it will be inferred that it can not be done. Parks v. Richardson, 4 B. Mon. (Ky.) 276.

The principal among these, are the existence of prescriptive rights and grants, from long continued possession, (*x*) &c. But it may well be doubted whether, even in such cases, the rule is, as has been suggested, (*y*) viz., that if the jury disregard the recommendation of the judge,—that such evidence warrants the presumption,—the court will direct a new trial, toties quoties. This would be very like setting aside trial by jury; and where several sets of men find on their oaths in a particular way, it would be more reasonable to presume that they did not do so without good grounds.<sup>1</sup>

### SUB-SECTION III.

#### CONFLICTING PRESUMPTIONS.

|  | PARAGRAPH |
|--|-----------|
| Maxim. "Stabatur præsumptioni donec probetur in contrarium" . . . . .                                  | 328       |
| Conflicting presumptions . . . . .   | 329       |
| Rules respecting . . . . .   | 330       |
| Rule 1. Special presumptions take precedence of general . . . . .                                      | 331       |
| Rule 2. Presumptions derived from the course of nature are stronger than casual presumptions . . . . . | 332       |
| Rule 3. Presumptions are favored which give validity to acts . . . . .                                 | 333       |
| Rule 4. The presumption of innocence is favored in law . . . . .                                       | 334       |

**328.** It is obvious from what has been already said, that the maxim, "Stabatur præsumptioni donec probetur in contrarium," (*z*) must be understood with

(*x*) *Jenkins v. Harvey*, 1 C. M. & 149.  
 R. 877, 895, per Alderson, B.; Gib- (*z*) Co. Litt. 373b; 2 Co. 48a; 2 Co.  
 son v. Musket, 3 Scott, N. R. 419. 73b; Hob 297; Jenk. Cent. 1, cas.  
 (*y*) Gale on Easements, 4th Ed. 62; 3 Bl. C. 371.

<sup>1</sup> The law presumes a verdict to be correct. Hence, on a motion for a new trial, the party must set forth the grounds upon which he intends to rely, or the motion will be considered as waived. Hilliard on New Trials, ch. 2, § 2, citing *Wing v. Owen*, 9 Cal. 247; *Collier v. State*, 20 Ark. 36; *Hamilton v. Congers*, 25 Geo. 158. So it will be presumed that inferior courts have not erred, unless the contrary be clearly shown *State v. Farish*, 23 Miss. (1 Cush.) 483.

considerable limitation. That maxim is obviously inapplicable, either to irrebuttable presumptions (*præsumptiones juris et de jure*), whose very nature is to exclude all contrary proof, or to those presumptions of fact which have been denominated slight (*præsumptiones leviores*). And it is, therefore, necessarily restricted to such presumptions of law or fact, mixed presumptions, and pieces or masses of presumptive evidence, as throw the burden of proof on the parties against whom they militate.

329. Rebuttable presumptions of any kind may be encountered by presumptive, as well as by direct evidence; (a) and the court may even take judicial notice of a fact—such, for example, as the increase in the value of money—for the purpose of rebutting a presumption, which would otherwise have arisen from uninterrupted modern usage. (b) Again, it not unfrequently happens that the same facts may, when considered in different points of view, form the bases of opposite inferences; and in either of these cases it becomes necessary to determine the relative weight due to the conflicting presumptions. The relative weight of conflicting presumptions of law is, of course, to be determined by the court or judge,—who should also direct the attention of the jury to the burden of proof as affected by the pleadings, and to the evidence in each case. And although the decision of questions of fact constitutes the peculiar province of the jury, they ought, especially in civil cases, to be guided by

(a) *Brady v. Cubitt*, 1 Dougl. 31, 39, per Lord Mansfield; *Jayne v. Price*, 5 Taunt. 326, 328, per Heath, J. : *R. v. The Inhabitants of Harborne*, 2 A. & E. 540; *Rickards v. Mumford*, 2 Phillim. 24, 25, per Sir John Nicholl; *Doe d. Harrison v. Hampson*, 4 C. B.

267; *Simpson v. Dendy*, 8 C. B., N. S. 433; *Menochius de Præs. lib. 1, quæst. 29. 30, 31*; *Mascardus de Prob. Concl. 1231*.

(b) *Bryant v. Foot*, L. Rep., 2 Q. B. 161; *S. C. (in Cam. Scac.)*, 3 Id. 49.

those rules regulating the burden of proof and the weight of conflicting presumptions, which are recognized by law, and have their origin in natural equity and convenience. It must not, however, be supposed that every *præsumptio juris* is, *ex vi termini*, stronger than every *præsumptio hominis*, or *præsumptio mixta*; on the contrary, which of any two presumptions ought to take precedence, must be determined by the nature of each. The presumption of innocence, for instance, is *præsumptio juris*; but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent possession of stolen property (*c*)—which is at most only *præsumptio mixta*.

**330.** The subject of conflicting presumptions seems almost to have escaped the notice of the writers on English law; but several rules respecting it have been laid down by civilians. Some of these are perhaps questionable; (*d*) but the following appear sound in principle; and, provided they are understood as being merely rules for general guidance, and not rules of universal obligation, they are likely to be serviceable in practice.

(*c*) *Suprà*, bk. 2, pt. 2.

(*d*) In addition to those mentioned in this chapter, Menochius gives the following (*De Præsumptionibus*, lib. 1, quæst. 29. See also *Id.*, *De Arbitrariis Judicium*, lib. 2, casus 472):—  
 “1. *Præsumptio* quæ a substantiâ provenit, dicitur potentior illâ quæ descendit à solemnitate. 2. *Præsumptio* judicatur potentior quæ est benignior. 3. *Præsumptio* judicatur firmior et potentior, quæ juri communi inhæret, et illa debilior quæ juri speciali. 4. *Præsumptio* est validior et potentior, quæ verisimilitudini magis convenit. 5. *Præsumptio* quæ descendit à quasi pos-

sessione est potentior illâ, quæ est, quod quælibet res præsumatur libera. 6. *Præsumptio* est potentior et firmior quæ est negativa, illâ quæ est affirmativa. 7. *Præsumptio* illa judicatur potentior et firmior quæ est fundata in ratione naturali, illâ quæ est fundata in ratione civili. 8. Firmior et validior existimatur illa *præsumptio*, quæ absurda et inæqualia evitantur. 9. *Præsumptio* quæ ducitur à facto, est firmior et potentior eâ quæ sumitur à non facto. 10. *Præsumptio* quæ favet animæ, sicque salutis æternæ, potentior et firmior est illâ quæ dicimus delictum non præsumi.”



**331.** 1. Special presumptions take precedence of general. (*e*) This is the chief rule; and it seems a branch of the more general principle, "It toto jure generi per speciem derogatur." (*f*) It rests on the obvious principle that, as all general inferences (except, of course, such as are *juris et de jure*) are rebuttable by direct proof, they will naturally be affected by that which comes nearest to it; namely, specific proximate facts or circumstances, which give rise to special inferences, negating the applicability of the general presumption to the particular case. Thus, although the owner in fee of land is presumed to be entitled to the minerals found under it, (*g*) this presumption may be rebutted by that arising from non-enjoyment by him, and the use of those minerals by others. (*h*) So, although the possession of land and the perception of rent is *prima facie* evidence of a seisin in fee, still, where the defendant, in a writ of right claimed under a remote ancestor, it was held that presumption was successfully encountered by proof, that the defendant and his father, through whom his title was traced, had for a long time allowed other parties to keep possession of the land, when they themselves lived in the neighborhood and must have been aware of it. (*i*) The flowing of the tide in a river is presumptive evidence of its being navigable; (*j*) but the presumption may be rebutted by proof of the narrowness of the stream, or the

(*e*) Menochius de Præsumptionibus, lib. 1, quæst. 29, nn. 7 & 8; Id. De Arbitrariis Judicium, lib. 2, casus 472, n. 14, *et seq.*; Huberus, Præl. Juris Civilis, lib. 22, tit. 3, n. 17; Id., Positiones Juris sec. Pand. lib. 22, tit. 3, n. 24; Mascardus de Probationibus, Concl. 1231. nn. 6 & 7; 2 Ev. Pothier, 332.

(*f*) Dig lib. 50, tit. 17, l. 80. See also Sext. Decretal. lib. 5, tit. 12, de Reg. Juris, Reg. 34.

(*g*) Rowbotham v. Wilson, 8 H. L. C. 348.

(*h*) Rowe v. Brenton, 8 B. & C. 737; Rowe v. Grenfel, R. & M. 396.

(*i*) Jayne v. Price, 5 Taunt. 326.

(*j*) Miles v. Rose, 5 Taunt. 705.

shallowness of its channel, or of acts of ownership by private individuals, inconsistent with a right of public navigation. (*k*) The presumption of innocence is a very general, and rather favored presumption; but guilt, as we see every day, may be proved by presumptive evidence. Where the publication of a libel has been proved, malice will be presumed, (*l*)<sup>1</sup> as it will also on a charge of murder, from the fact of slaying. (*m*) So, if a libel be sold by a servant in the discharge of his ordinary duty, this is presumptive, and—at least since the 6 & 7 Vict. s. 7—only presumptive evidence of publication by the master. (*n*) So it is said to have been a rule in the ecclesiastical courts, that where the existence of an adulterous intercourse had been proved, its continuance would be presumed so long as the parties lived under the same roof. (*o*) So, although a fine, without any deed executed to declare the uses, was presumed to have been levied to secure the title of the conusor, evidence was receivable to rebut this presumption, and to show that it was levied to vest the land in the conusee. (*p*) But it is not every circumstance or special inference that will suffice to set aside a general presumption, either of law or fact.

**332. II.** Presumptions derived from the course of nature are stronger than casual presumptions. (*q*)

(*k*) *Id.*; *R. v. Montague*, 4 B. & C. 598; *Mayor of Lynn v. Turner*, Cowp. 86.

(*l*) *Haire v. Wilson*, 9 B. & C. 643.

(*m*) *Foster's C. L.* 255, 290; 1 *Hale*, P. C. 455; 1 *East*, P. C. 340.

(*n*) *R. v. Walter*, 3 Esp. 21; *R. v. Gutch*, 1 Mood. & M. 437.

(*o*) *Turton v. Turton*, 3 Hagg. N. C. 350.

(*p*) *Roe v. Popham*, 1 Dougl. 25; *Peake's Ev.* 119, 5th Ed.

(*q*) *Menochius de Præs. lib. 1, quæst. 29, n. 9*; *Id. de Arbitrariis Judicium, lib. 2, casus 472, n. 19*; *Mascardus de Probat. quæst. 10, n. 18*, and *Concl. 1231, nn. 17 & 18*; *Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 17*; *Id. Positiones Juris sec. Pand. lib. 22, tit. 3, n. 24*.

<sup>1</sup> *Morgan's Laws of Literature*, vol. 1, p. 139.



This is a very important rule, derived from the constancy and uniformity observable in the works of nature, which render it probable that human testimonies, or particular circumstances which point to a conclusion at variance with her laws, are, in the particular instance, fallacious. "*Naturæ vis maxima.*" (r) Thus, on an indictment for stealing a log of timber, it would probably be considered a sufficient answer to any chain of presumptive evidence, or even to the positive testimony of an alleged eye-witness, to show that the log in question was so large and heavy that ten of the strongest men could not move it. (s) A charge of robbery brought by a strong person against a girl or a child, or of rape brought by an athletic female against an old or sickly man, would be refuted in this way. So, although this likewise rests in some degree on principles of public policy, (t) sanity is always presumed, even when the accused is on his trial on a capital charge. (u) Under this head come also those instances, in which presumptions drawn from the natural feelings of the human heart have been found to prevail over others, and among the rest, over that arising from possession, as in the judgment of Solomon, already mentioned. (v) So, where a parent advances money to a child, it is presumed to be by way of gift and not by way of loan; (x) and the harsh doctrine of collateral warranty rested, in some degree, on a strained application of this principle. (y)

(r) 2 Inst. 564; Plowd. 309.

(s) Menochius de Arbitrariis Jud. lib. 2, casus 472, n. 21.

(t) *Infrà*, sect. 3, sub-sect. 1.

(u) Answer of the Judges to the House of Lords, 8 Scott, N. R. 595; 1 Car. & K. 131; R. v. Stokes, 3 Car.

& K. 185.

(v) 1 Kings, iii. 16; *suprà*, sub-sect. 2.

(x) Dig. lib. 10, tit. 2, l. 50; Voet. ad Pand. lib. 22, tit. 3, n. 15, vers. fin.; per Bayley, J., in Hick v. Keats, 4 B. & C. 69, 71.

(y) Co. Litt. 372a.

**333. III.** Presumptions are favored which give validity to acts. (*z*) The maxim, "Omnia præsumuntur rite esse acta," will be considered in its place; (*a*) and it will only be necessary, at present, to advert to some cases, in which this presumption has been held to override others also of a favored kind, as for instance that of innocence. On an indictment for the murder of a constable, the fact of the deceased having publicly acted as constable, is sufficient *prima facie* proof of his having been such, without producing his appointment. (*b*) And on an indictment for perjury, in taking a false oath before a surrogate, it is sufficient, *prima facie*, to prove that the party administering the oath acted as surrogate. (*c*)

**334. IV.** The presumption of innocence is favored in law. (*d*) This is a well-known rule, and runs through the whole criminal law;<sup>1</sup> but it likewise

(*z*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 17; Id. Positiones Jur. sec. Pand. lib. 22, tit. 3, n. 24; Menochius de Præs. lib. 1, quæst. 29, n. 3; Id. de Arbitrar. Jud. lib. 2, cas. 472, n. 2; Mascardus de Prob. Concl. 1231, nn. 20 & 23.

(*a*) *Infrâ*, sect. 2, sub-sect. 4.

(*b*) R. v. Gordon, 1 Leach. C. L. 515.

(*c*) R. v. Verelst, 3 Camp. 432.

(*d*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 17; Id. Positiones Jur. sec. Pand. lib. 22, tit. 3, n. 24; Menochius de Præs. lib. 1, quæst. 29, n. 11; Id. de Arbitr. Jud. lib. 2, cas. 472, n. 25; Mascard. de Prob. Concl. 1231, nn. 9, 30, &c.; R. v. The Inhabitants of Twynning, 2 B. & Ald. 386; Middleton v. Barned, 4 Exch. 241.

<sup>1</sup> It is settled in the United States, for instance, that the presumption of innocence will override all other presumptions, even the presumption of chastity in a female. *West v. State*, 1 Wis. 209. And so, too, the legal presumption that a given state of facts continues until the contrary is shown, is controlled by the presumption in favor of innocence. *Klein v. Landman*, 29 Mo. 259.

And so far will this override all other presumptions, that in an indictment for seduction, the law does not presume the previous chastity of the female, such a presumption being inconsistent with that of the prisoner's innocence, but such chastity must be proved by the government, it being essential to the constitution of the offense charged. *West v. State*, 1

holds in civil proceedings. In *R. v. The Inhabitants of Twynning*, (e) which is certainly one of the leading authorities on the subject of conflicting presumptions, it appeared by a case sent up from the sessions, that about seven years before that time, a female pauper intermarried with Richard Winter, with whom she lived a few months, when he enlisted as a soldier, went abroad on foreign service, and was never afterwards heard of. In little more than twelve months after his departure, she married Francis Burns. On this evidence the Court of Queen's Bench, consisting of Bayley and Best, JJ., held that the issue of the second marriage ought to be presumed legitimate; and the former judge said, (f) "This is a case of conflicting presumptions, and the question is, which is to prevail. The law presumes the continuation of life, but it also presumes against the commission of crimes, and that even in civil cases until the contrary be proved. . . . The facts of this are, that there is a marriage of the pauper with Francis Burns, which is *prima facie* valid; but the year before that took place, she was the wife of Richard Winter, and if he was alive at the time of the second marriage, it was illegal, and she was guilty of bigamy. But are we to presume that Winter was then alive? If the pauper had been indicted for

(e) 2 B. &amp; Ald. 386.

(f) 2 B. &amp; Ald. 388.

Wis. 209. When the presumption of a continuation of life conflicts with that of another person's innocence of a criminal offense the latter will prevail. *Sharp v. Johnson*, 22 Ark. 79. The presumption in favor of innocence holds in all civil suits in which it comes collaterally in question. *Case v. Case*, 17 Cal. 598.

So the legal presumption of the continuance of life is not so strong as the legal presumption of innocence, and where the two conflict, the former must yield to the latter. *Lockhart v. White*, 18 Tex. 102.

bigamy, it would clearly not be sufficient. In that case Winter must have been proved to have been alive at the time of the second marriage. It is contended that his death ought to have been proved; but the answer is, that the presumption of law is, that he was not alive when the consequence of his being so is, that another person has committed a criminal act. I think, therefore, that the sessions decided right, in holding the second marriage to have been valid, unless proof had been given that the first husband was alive at the time." This language goes further than was necessary for the decisions of the actual case before the court; and it certainly can not be supported to its full extent, as appears from the subsequent case of *R. v. The Inhabitants of Harborne*. (g) There, in order to support an order for the removal of a female pauper, of the name of Ann Smith, it was proved that on the 11th April, 1831, she had been married to one Henry Smith, who had since deserted her; in answer to which it was shown that he had been previously married, October, 1821, to another female with whom he lived until 1825, when he left her; that several letters had since been received from her from Van Diemen's Land, one of which was produced, bearing date twenty-five days previous to the second marriage. The sessions, on this evidence, presumed the first wife to be living at the time of the second marriage, and quashed the order. On the case coming on for argument before the Court of Queen's Bench, several cases were cited, and *R. v. Twyning* was relied on as an authority, to show that the party asserting the life of the first wife, and thereby the criminality of the husband, was bound to show the continuance of the life up to the very moment of the second marriage; and that

the court was precluded from inferring the continuance of the life until the marriage by the strict rule of legal presumption laid down in that case. The court, however, consisting of Lord Denman, C. J., and Littledale and Williams, JJ., held that the conclusion drawn by the sessions from the evidence was proper. Lord Denman, in the course of his judgment, expressed himself as follows: "The only circumstance raising any doubt in my mind, in the doctrine laid down by Bayley, J., in *R. v. Twyning*. But in that case, the sessions found that the plaintiff was dead; and this court merely decided, that the case raised no presumption upon which the finding of the sessions could be disturbed. The two learned judges, Bayley, J., and Best, J., certainly appear to have decided the case upon more general grounds; the principle, however, on which they seem to have proceeded, was not necessary to that decision. I must take this opportunity of saying, that nothing can be more absurd than the notion, that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances, such, for instance, as the age or health of the party. There can be no such strict presumption of law. . . . I am aware that Bayley, J., founds his decision on the ground of contrary presumptions; but I think that the only question in such cases are, what evidence is admissible, and what inference may fairly be drawn from it. It may be said, suppose a party were shown to be alive within a few hours of the second marriage, is there no presumption then? The presumption of innocence can not shut out such a presumption as that supposed. I think no one, under such circumstances, could presume that the party was not alive at the time of the second marriage." Judgments to a similar effect were given by

the other members of the court. There is no conflict whatever between the decisions in the cases of *R. v. The Inhabitants of Twynning*, and *R. v. The Inhabitants of Harborne*, nor does the principle involved in either of them present any real difficulty. The presumption of innocence is a *præsumptio juris*, and, as such, is good until disproved. *R. v. Twynning* decides that the presumption of the fact of the continuance of life, derived from the first husband's having been shown to be alive about a year previous to the second marriage, ought not to outweigh the former presumption in the estimation of the sessions or a jury; while *R. v. Harborne* determines, that if the period be reduced from twelve months to twenty-five days it would be otherwise; and that the sessions or jury might, in their discretion, presume the first husband to be still living. This view of these cases is confirmed by the judgment of the House of Lords, in the subsequent case of *Lapsley v. Grierson*. (*h*)

(*h*) 1 Ho. Lo. Cas. 498.



## SECTION II.

PRESUMPTIONS OF LAW AND FACT USUALLY MET IN  
PRACTICE.

**335.** It is proposed in this section to consider the principal presumptions of law and fact usually met with in practice, and which will be treated in the following order :

1. Presumption against ignorance of the law.
2. Presumptions derived from the course of nature.
3. Presumptions against misconduct.
4. Presumptions in favor of the validity of acts.
5. Presumptions from possession and user.
6. Presumptions from the ordinary conduct of mankind, the habits of society, and the usages of trade.
7. Presumption of the continuance of things in the state in which they have once existed.
8. Presumptions in disfavor of a spoliator
9. Presumptions in international law.
10. Presumptions in maritime law.
11. Miscellaneous presumptions.

## SUB-SECTION I.

## PRESUMPTION AGAINST IGNORANCE OF THE LAW.

|  | PARAGRAPH |
|--|-----------|
| Presumption against ignorance of the law . . . . . | 336       |
| Generally . . . . .                                | 336       |
| Courts of justice . . . . .                        | 337       |
| The Sovereign . . . . .                            | 337       |

**336.** The law presumes conclusively against ignorance of its provisions. It is a *presumptio juris et de jure*, that all persons subject to any law which has been duly promulgated, or which derives its efficacy from general or immemorial custom, must, for the reasons stated in the introduction to this work, (*i*) be supposed to be acquainted with its provisions, so far as to render them amenable to punishment for their violation, and to have done all acts with a knowledge of their legal effects and consequences. (*j*)—"Ignorantia juris, quod quisque tenetur scire, non excusat." (*k*)<sup>1</sup>

(*i*) Part. 2, § 45.

Dougl. 471; 2 East, 472; 3 M. &

(*j*) Dr. & Stud. Dial. 1, c. 26;

Selw. 378.

Dial. 2, cc. 16, 46; Plowd. 342-3; 1

(*k*) 4 Blackst. Comm. 27.

Co. 177b; 2 Co. 3b; 6 Co. 54a; 2

<sup>1</sup> But, it seems, this is a rebuttable presumption. The maxim, "*ignorantia legis neminem excusat*," is founded upon the presumption that every one competent to act for himself, knows the law, but the presumption that he knows it is not conclusive, and may be rebutted. So when a plaintiff alleges in his bill, that he was ignorant of the law, and the defendant demurs, it seems that the latter can not take advantage of the maxim. *Hart v. Roper*, 6 Ired. (N. C.) Eq. 349; and see *Butler v. Livingston*, 15 Ga. 565, which holds that until the contrary appears, every man is presumed to be cognizant of the law, and of his legal rights (as to which, see also *Calais, &c. Co. v. Van Pelt*, 2 Black, 372). The terms of a supreme

**337.** Courts of justice are also presumed to know the law, but in a different sense. Private individuals are only taken to know it sufficiently for their personal guidance; but tribunals are to be deemed acquainted with it, so as to be able to administer justice when called on; (*l*) for which reason it is not necessary, in pleading, to state matter of law. (*m*)<sup>1</sup>

(*l*) See the judgment of Maule, J., in *Martindale v. Falkner*, 2 C. B. 719—

Gen. in *Stockdale v. Hansard*, 9 A. & E. 1, 131.

20; and the argument of the Att.-

(*m*) Steph. Plead. 383, 5th Ed.; 1 Chit. Plead. 216, 6th Ed.

court, which are fixed by law, are a part of the law which a man is presumed to know. *Gouldin v. Shehee*, 20 Ga. 531.

<sup>1</sup> And this general presumption and knowledge will extend to one's private concerns. So it is a reasonable presumption that those who are dealing in articles of commerce, especially those who purchase by wholesale from the importers, are acquainted with the different names by which such articles are known to the commercial world. *Moore v. Des Arts*, 2 Barb. (N. Y.) Ch. 636; or when persons are engaged in any particular traffic, that they are better acquainted with the value of the commodities in which they deal than the community generally. *Hickley v. Kersting*, 21 Ill. 247. Where inhabitants of a township received and expended the proceeds of school lands, and the purchaser made valuable improvements, the court presumed that the inhabitants were cognizant of the improvements, &c., and held them bound by the sale. *State v. Stanley*, 14 Ind. 409; but it seems that there is no presumption of law that the mayor and clerk of a city know the contents of the city records. *Lancey v. Bryant*, 30 Me. 466. The presumption is, that every man knows the records of the proceedings of the court after he has been brought into it. *Watrous v. Rogers*, 16 Tex. 410.

But even courts will not be expected to take judicial notice of private acts of a legislature. *Atchison, &c. R. R. Co. v. Blackshire*, 10 Kan. 477.

An act incorporating a bank, for the sole benefit of private persons, is not such a general law as every one is presumed to know. Special or private laws stand in this respect on the same footing as foreign laws—ignorance of them is regarded as ignorance of facts. *King v. Doolittle*, 1 Head. (Tenn.) 77.

A private bank charter is merely the title of the parties,

The Sovereign is also presumed to be acquainted with the law—"Præsumitur rex habere omnia jura in scrinio pectoris sui;" (*n*) still it is competent in certain cases to show that grants from the crown have been made under a mistake of the law. (*o*)

## SUB-SECTION II.

### PRESUMPTIONS DERIVED FROM THE COURSE OF NATURE.

|  | PARAGRAPH |
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**338.** Presumptions derived from the course of nature have been already noticed as in general entitled to more weight than such presumptions as arise casually. (*p*)—"Naturæ vis maxima," (*q*)—and they

(*n*) Co. Litt. 99a.

(*p*) *Suprà*, sect. 1, sub-sect. 3, §

(*o*) Plowd. 502; 2 Blackst. Comm. 334.

348; R. v. Clarke, 1 Freem. 172. See (*q*) 2 Inst. 564; Plowd. 309. Legat's case, 10 Co. 109.

and should stand in this respect on the same footing as titles to other private property. Id.

No person is bound to know the by-laws of an academy, or to take notice of the existence of any laws but those which are public. *Boyers v. Pratt*, 1 Humph. (Tenn.) 90.

And so the presumption that all persons know the law must be confined to presuming that all persons know the law exists. But not that they will be presumed to know how the courts will construe it, and whether, if it be a statute, it will or will not be held to be constitutional. *Brent v. State*, 43 Ala. 297.

may be divided into physical and moral. As instances of the first, the law notices the course of the heavenly bodies, the changes of the seasons, and other physical phenomena, according to the maxim—"lex spectat naturæ ordinem." (*r*)<sup>1</sup> "If," says Littleton, (*s*) "the tenant holds of his lord by a rose, or by a bushel of roses, to pay at the feast of St. John the Baptist; if such tenant dieth in winter, then the lord can not distrain for his relief, until the time that roses, by the course of the year, may have their growth." So the law presumes all individuals to be possessed of the usual powers and faculties of the human race; such as common understanding, the power of procreation within the usual ages, (*t*) &c.; for which reason idiocy, lunacy, &c., are never presumed. And the usual incapacities of infancy are not overlooked. It is a *præsumptio juris et de jure*, that children under the age of seven years are incapable of committing felony; (*u*) that males under fourteen are incapable of sexual intercourse; (*x*) and that males under fourteen years, and females under twelve, can not consent to marriage. (*y*) So, between the ages of seven and fourteen, an infant is presumed incapable of commit-

(*r*) Co. Litt. 92a, 197b.

(*s*) Sect. 129.

(*t*) Huberus, *Præl. Jur. Civ. lib. 22*, tit. 3, n. 17. In the case of gifts in tail, the tenant is presumed never too old to be capable of having issue to inherit by force of the gift. *Phill. & Am. Ev.* 462. See also *Reynolds v. Reynolds*, 1 *Dick.* 374, and *Leng v. Hodges*, 1 *Jac.* 585. Several instances are given in *Beck's Med. Jurisp.* 148, 7th Ed., of females having borne children above the ages of fifty, and even sixty, years; and see the celebrated

Douglass cause, given by him at page 402. Under the feudal system, if a guardian in chivalry married the heir to a woman past the age of child-bearing, it was deemed by law a disparagement. *Litt. sect.* 109; *Co. Litt.* 80b.

(*u*) 1 *Hale, P. C.* 21; 4 *Blackst. Comm.* 23.

(*x*) 1 *Hale, P. C.* 630; *R. v. Phillips*, 8 *C. & P.* 736; *R. v. Jordan*, 9 *Id.* 118; *R. v. Bimilow*, *Id.* 336; *R. v. Groombridge*, 7 *C. & P.* 582.

(*y*) 1 *Blackst. Comm.* 436.

<sup>1</sup> See *ante*, vol. 1, p. 408, note 1.

ing felony; but this is only *presumptio juris*; and a malicious discretion in the accused may be proved, in which case it is said "*malitia supplet ætatem*." (2)

339. Under this head come the important and difficult questions of the maximum and minimum term of gestation of the human foetus—questions replete with importance and delicacy, and an erroneous decision on which may not only compromise the rights of individuals, but destroy female honor, and jeopardize the peace of families. These are medico-legal subjects, on which, where we are not tied up by any positive rule of law, the opinions of physiologists and physicians must necessarily have great weight. As to the maximum term of gestation—according to Sir Edward Coke, the "*legitimum tempus* appointed by law at the furthest is nine months, or forty weeks;" for which he cites an old case of Robert Radwell, in the reign of Edward I., (a) and endeavors to fortify his position by a passage from the Book of Esdras. (b) But this doctrine is not clear even upon the ancient authorities; (c) while it is denied by the modern, (a) and is contrary to experience.<sup>1</sup> According to many

(2) 1 Hale, P. C. 26; 4 Blackst. Comm. 23.

(a) Co. Litt. 123b.

(b) 2 Esdras, iv. 40, 41. "Go thy way to a woman with child, and ask of her, when she hath fulfilled her nine months, if her womb may keep the birth any longer within her. Then

said I, 'No, Lord, that can she not.'"

(c) See them collected and ably commented on by Mr. Hargrave, in his edition of Co. Litt. 123b, n. (2).

(d) Runninton on Ejectment, 383, *et seq.*

<sup>1</sup> In the Commonwealth v. Hooper (or Porter), cited in Taylor's Medical Jurisprudence, vol. ii. p. 296 (2d Ed.), the alleged duration of pregnancy must have been three hundred and thirteen days, or forty-four weeks and five days. The prosecutrix deposed that she had had frequent intercourse with the defendant on the 23d March, 1845, and not subsequently, which fact also appeared in evidence—while the child was born on the 30th of January, 1846. "Twelve obstetric phy-

eminent authorities, the usual period of gestation<sup>a</sup> is nine calendar months; (e) but others fix it at ten lunar months, being two hundred and eighty days, or nine calendar months and about a week over. (f) Another says that "according to the testimony of experienced accoucheurs, the average duration of gestation in the human female, is comprised between the thirty-eighth and fortieth weeks after conception." (g) It is, however, conceded on all hands, that a delay or difference in the time may take place, of a few days, or perhaps even weeks; as there are numerous causes, both physical and moral, by which delivery may be accelerated or retarded. But whether the laws of nature admit of such a phenomenon, as the protraction of the term of gestation for a considerable number of weeks or months beyond the accustomed period, is an unsettled point. (h) It is incontestable that there are to be found on record a

(e) Harg. Co. Litt. 123b, n. (2); Chitty's Med. Jurisp. 405.

(f) Beck's Med. Jurisp. 356, 7th Ed.; who remarks that it is very important to recollect the distinction between lunar and calendar months. Nine calendar months may be from

273 to 275 days, but ten lunar months are 280 days.

(g) Tayl. Med. Jurisp. 606-7, 7th Ed.

(h) Beck's Med. Jurisp. chap. 9, 7th Ed.; Chitty, Med. Jurisp. 405, 406; Tayl. Med. Jurisp. 525, c. 54, 7th Ed.

sicians were examined on the trial, and as usual, they differed from each other. Some regarded it as possible, but not probable, that gestation might be so protracted as to reach three hundred and thirteen days: various medical works were quoted on the subject. The court charged the jury that although unusual and improbable, this length of gestation was not impossible, and they returned a verdict finding that the defendant was the father of the child" (Id.). "In extra uterine pregnancy the fœtus may be carried for many years. Dr. Craddock relates a case in which gestation was thus protracted for the very long period of twenty-two years" (Phil. Med. Exam., May, 1846, p. 286). Id. And see Beck's Medical Jurisprudence, vol. 1, 607 (12th Ed.).

great many cases, true or false, of gestation protracted considerably beyond the usual time. There are old instances of children declared legitimate by foreign tribunals, after a gestation, real or alleged, of ten, eleven, twelve, thirteen, and fourteen months, and even longer. (*i*) Upon the whole we may fairly conclude that, admitting the possibility of gestation being protracted in the sense in which the word is here used, the genuine cases of it are rare. (*k*) It is, perhaps, hardly necessary to observe that, in all investigations of this nature, the character and conduct of the mother are elements of the highest importance to be taken into consideration; as also are the characters of the deposing witnesses and the motives to falsehood or fabrication which may exist on either side.

**340.** With respect to the minimum term of gestation—it seems now conceded that, as a general rule no infant can be born capable of living until one hundred and fifty days, or five months, after conception. (*l*) There are, it is true, some old cases recorded to the contrary, (*m*) but they have been doubted. (*n*) It seems also conceded that children born before seven months are very unlikely to live, and that even at seven months the chance is against the child. (*o*)

(*i*) See a large number collected in Beck's *Med. Jurisp.* 262–76, 7th Ed., as well as in other authors who have written on the subject.

(*k*) It is difficult to withhold assent from the following observations of a French writer:—"If we admit all the facts reported by ancient and modern authors, of delivery from eleven to twenty-three months, it will be very commodious for females; and if so great a latitude is allowed for the production of posthumous heirs, the col-

lateral ones may in all cases abandon their hopes, unless sterility be actually present" (Louis, *Mémoires contre Légitimité des Naissances prétendues tardives*, as cited in Beck's *Med. Jurisp.* 366, 7th Ed.).

(*l*) Beck's *Med. Jurisp.* 210, 7th Ed.

(*m*) *Id.*, and Chitty's *Med. Jurisp.* 406.

(*n*) Beck, *Med. Jurisp.* 210, 7th Ed.

(*o*) *Id.* 212; Tayl. *Med. Jurisp.* 615, *et seq.*, 7th Ed.



**341.** We now proceed to the consideration of presumptions of this kind, derived from observation of the moral world. Many of these are founded on the feelings and emotions natural to the human heart, of which we have already seen an instance in the celebrated judgment of Solomon. (*p*) Following out this principle, it is held that natural love and affection form a good consideration, sufficient to support all instruments where a valuable consideration is not expressly required by law; (*q*) that money advanced by a parent to his child is intended as a gift, not as a loan, (*r*) &c. And it is a maxim of law, "*Nemo præsумitur alienam posteritatem suæ prætulisse.*" (*s*)

**342.** The civil law laid down as a maxim, "*Qui solvit, nunquam ita resupinus est, ut facile suas pecunias jacet, et indebitas effundat:*" (*t*) and in the common law, the fact of transferring money to another person is presumptive evidence of payment of an antecedent debt, and not a gift or loan. (*u*) "*Non præsумitur donatio.*" (*v*)

**343.** It was said by Abbott, C. J., in the case of *Townson v. Tickell*, (*w*) that, "*prima facie, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is given:*" and presumptions are sometimes founded on the as-

(*p*) 1 Kings, iii. 16.

(*q*) 2 Blackst. Com. 297; Dy. 374, pl. 17; Plowd. 306, 309; Finch, Law, 25.

(*r*) *Hick v. Keats*, 4 B. & C. 69, 71, per Bayley, J. "*Quæ pater filio emancipato studiorum causâ peregre agenti subministravit si non credendi animo pater misisse fueret comprobatus, sed pietate debitâ ductus, in rationem portionis, quæ ex defuncti bonis, ad eundem filium pertinuit, computare æquitas non patitur.*" Dig, lib.

10, tit. 2, l. 50. See also Mascard. de Prob. Conclu. 76.

(*s*) Co. Litt. 373 a; Wing. Max. 285.

(*t*) Dig. lib. 22, tit. 3, l. 25. See also Voet. ad Pand. lib. 22, tit. 3, n. 15.

(*u*) *Welch v. Seaborn*, 1 Stark. 474; *Cary v. Gerish*, 4 Esp. 9; *Aubert v. Walsh*, 4 Taunt. 293; *Breton v. Cope*, 1 Peake, 31.

(*v*) Matth. de Prob. cap. 2, n. 10

(*w*) 3 B. & A. 31, 36

sumption, that a person must be taken to be willing to receive a benefit. (x) Thus, in *Thompson v. Leach* (y) it was held that a surrender immediately divests the estate out of the surrenderor, and vests it in the surrenderee, whose consent to the act is implied; for, says the book, "a gift imports a benefit, and an assumpsit to take a benefit may well be presumed; and there is the same reason why a surrender should vest the estate before notice or agreement, as why a grant of goods should vest a property, or sealing of a bond to another in his absence, should be the obligee's bond immediately, without notice." In *Smyth v. Wheeler*, (z) where a lease was assigned to B. and C. on a certain trust, Hale, C. J., said, "This assignment, being of a chattel, is in both the assignees till the disagreement of B., and then is wholly in C." So that it is said that mutual benefit is evidence of an agreement; as where two men front a river, and each of them has land between him and the river, and they cut through each other's ground for water, and that continues twenty years, in such a case an agreement may be presumed. (a)

344. It is also a maxim running through the whole law, that every person must be taken to intend the natural consequences of his acts. (b) Thus it is held that, inasmuch as the effect of a conveyance of property by way of fraudulent preference, must be to delay or defeat creditors, the law will presume that such conveyance was made with that intention. (c)

(x) *Thompson v. Leach*, 2 Salk. 618; also reported 3 Lev. 284; 2 Vent. 198; *Thomas v. Cook*, 2 B. & Ald. 119, 121. See *Burton, Real Prop.* 67, 8th Ed.

(y) 2 Salk. 618; also reported 3 Lev. 284; 2 Vent. 198.

(z) 2 Keb. 774.

(a) Vin. Abr. Ev. Q. A. pl. 8.

(b) 2 Stark. Ev. 572, 3rd Ed.; 1 Greenl. Ev. § 18, 7th Ed.

(c) Per Lord Cairns, C., *Ex parte Villars*, L. Rep., 9 Ch. Ap. 432, 443.

But the principal applications of this maxim are to be found in criminal cases, as will be shown in a subsequent part of this chapter. (*d*)<sup>1</sup>

### SUB-SECTION III.

#### PRESUMPTIONS AGAINST MISCONDUCT.

|  | PARAGRAPH |
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| 6. Presumption of the truth of testimony . . . . .             | 352       |

345. We next proceed to consider the presumptions which the law makes against misconduct.

346. First, then, it is a *præsumptio juris*, running

(*d*) *Infrà*, sect. 3, sub-sect. 1.

<sup>1</sup> As a necessary consequence of knowing the law, every one will be presumed to know the consequences of his own acts. *Mears v. Graham*, 8 Blackf. 144. So it will be presumed that a man knows the nature of that to which he directs his name to be signed, although he may be unable to read or write, unless some advantage was taken of his ignorance. *Harris v. Story*, 2 E. D. Smith (N. Y.) 363; *Androscoggin Bank v. Kimball*, 10 Cush. (Mass.) 373; *Clem v. New and Lau. R. R. Co.*, 9 Ind. 488.

When one instrument has by law a conclusive and another a *prima facie* character, a party using either is presumed to intend it according to its legal effect. *Jones v. Ricketts*, 7 Md. 108.

And so the law will presume that a prisoner intended to effect the ordinary consequences of his act, and it devolves on him to rebut the presumption. *People v. Orcutt*, 1 Park (N. Y.) Cr. 252.

through the whole law of England, that no person shall, in the absence of criminative evidence, be supposed to have committed any violation of the criminal law,<sup>1</sup> whether *malum in se* or *malum prohibitum*, (*e*)—or to have done any act subjecting him to any species of punishment, such, for instance, as a contempt of court; (*f*) or involving a penalty, such as loss of dower, (*g*) &c. And this presumption is not confined to proceedings instituted for the purpose of punishing the supposed offense, or of dealing with the supposed conduct; but it holds in all proceedings for whatever purposes originated, and whether the guilt of the party comes in question directly or collaterally. (*h*)<sup>2</sup> It is, therefore, a settled rule in criminal cases, that the accused must be presumed to be innocent until proved to be guilty; and consequently,

(*e*) Phil. & Am. Ev. 464; 2 Ev. Poth. 332.

(*f*) Scholes v. Hilton, 10 M. & W. 15, 17.

(*g*) Sidney v. Sidney, 3 P. Wms. 276; Watkins v. Watkins, 2 Atk. 96; Clarke v. Periam, Id. 333.

(*h*) Williams v. The East India Company, 3 East, 192; R. v. The In-

habitants of Twynning, 2 B. & A. 386; R. v. The Inhabitants of Harborne, 2 A. & E. 540; Lapsley v. Grierson, 1 Ho. Lo. Cas. 498; Rodwell v. Redge, 1 C. & P. 220; Ross v. Hunter, 4 T. R. 53, 38, per Buller, J.; Leete v. The Gresham Life Insurance Society, 15 Jurist, 1161, 1162, per Platt, B.

<sup>1</sup> United States v. Gooding, 12 Wheat. 460; Id. v. Douglass, 2 Blatchf. 207.

<sup>2</sup> So in civil cases the presumption will be in favor of regularity. For instance, in a prosecution for not making the requisite report of a vessel's arrival to the officer of customs, the burden is upon the government to prove that it was not made at the proper office. United States v. Galacar, 1 Sprague, 545.

An insolvent debtor, when he renders a schedule of his property and debts, is presumed to tell the truth, and not to commit perjury. Harlett v. Hewlett, 4 Edw. (N. Y.) 7.

If bank notes are shown to have circulated as money, they will be presumed to be genuine. Hummel v. State, 17 Ohio St. 628.

that the onus of proving everything essential to the establishment of the charge against him, lies on the prosecutor—a maxim founded on the most obvious principles of justice and policy. (i) It is, however, in general sufficient to prove a *prima facie* case; for as has been well remarked, “imperfect proofs, from which the accused might clear himself, and does not, become perfect.” (j) “In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him in the absence of explanation or contradiction.” (k) Undoubtedly, the more serious or improbable the charge, the stronger must be the *prima facie* proof; and additional caution is required when the offense is of very ancient date; for in such cases the means of defense, particularly by proof of an alibi—when true, the most complete of all answers—are greatly diminished. (l) Although in point of law

(i) *Introd.* pt. 2, § 49. It is related that on one occasion, when the Emperor Julian was sitting to administer justice, a prosecutor, seeing his cause about to fail for want of proof, exclaimed, “*Ecquis, florentissime, Cæsar, nocens esse poterit usquam, si negare suffecerit?*” To which the emperor readily rejoined, “*Ecquis innocens esse poterit, si accusasse sufficiet.*” *Ammianus Marcellinus*, lib. 18, c. 1.

(j) *Beccaria, Dei Delitti et delle Pene*, § 7.

(k) *Per Abbott, C. J., in R. v. Burdett*, 4 B. & A. 95, 161–2. See also *per Lord Mansfield, in Blatch v. Archer*, *Cowp.* 63, 65.

(l) *Wills, Circ. Ev.* 148, 3rd Ed. There are several instances of successful prosecution, after the lapse of very long time from the commission of the offense. See, in particular, the case of *W. A. Horne*, who was tried and executed in 1759, for the murder of his child in 1724 (2 *Annual Reg.* 363); also, that of *Joseph Wall*, Governor of *Goree*, who was executed in 1802 for a murder committed in 1782 (28 *Ho. St. Tr.* 51). In the celebrated case of *Eugene Aram*, also, there was an interval of about fourteen years between the murder and the trial (2 *Annual Reg.* 351).

“Nullum tempus occurrit regi;” yet as matter of practice, “Accusator post rationabile tempus non est audiendus, nisi bene de se omissionem excusaverit.”

(*m*) But the presumption in favor of innocence will not be made when a stronger presumption is raised against it by evidence or otherwise. (*n*)<sup>1</sup>

347. It is a branch of this rule that ambiguous instruments or acts shall, if possible, be construed so as to have a lawful meaning. (*o*) Thus, where a deed, or other instrument is susceptible of two constructions, one of which the law could carry into effect, while the other would be in contravention of some legal principle or statutory provision, the parties will always be presumed to have intended the former. “In facto quod se habet ad bonum et malum, magis de bono quam de malo, lex intendit.” (*p*) Thus, where tenant in tail makes a lease for life, without saying for whose life, it shall be understood that he meant his own, as that is an estate he may lawfully create; whereas, if he meant it for the life of any one else, he would exceed his power, and, previous to the 3 & 4 Will. 4, c. 27, s. 39, would have worked a discontinuance. (*q*) So where A, who had commenced an action against B, to recover a sum of money, agreed with C to suspend the proceedings, on payment of a specified sum, and the delivery of several promissory notes, C undertaking,—in the event of any of the notes being dishonored, and A issuing a *capias* or detainer against

(*m*) Moore, 817.

57.

(*n*) See *supra*, sect. 1, subsect. 3.

(*p*) Co. Litt. 78b.

(*o*) Co. Litt. 42a & b; Finch, Law,

(*q*) *Id.* 42a.

<sup>1</sup> So an attempt to escape from arrest upon a charge of crime, may raise a presumption of guilt. *State v. Williams*, 54 Mo. 170. But circumstances have been held to vary even the presumption of innocence. *Harrington v. State*, 14 Ohio, 264.

B,—either to surrender him to custody, or pay the money due on the notes; it was held that the contract was legal, and must be understood to mean, that C was to procure the surrender of B by lawful means, as by his consent, and not by any attempt to take him forcibly into custody. (r)

348. 2. All persons are presumed to have duly discharged any obligation imposed on them either by unwritten or written law.<sup>1</sup> Thus the judgment of courts of competent jurisdiction are presumed to be well founded; (s) and their records to be correctly made; (t) judges and jurors are presumed to do nothing causelessly or maliciously; (u)—“De fide

(r) *Lewis v. Davidson*, 4 M. & W. 654.

(s) “*Res judicata pro veritate accipitur*.” Co. Litt. 103a; Dig. lib. 50, tit. 17, l. 207; Introd. Part 2, § 44.

(t) 1 Stark. Ev. 252, 3rd Ed.; *Read v. Jackson*, 1 East, 355; *Earl of Carnarvon v. Villebois*, 13 M. & W. 313.

(u) *Anders*, 47, pl. 34; *Sutton v. Johnstone*, 1 T. R. 493, 503; *Fray v.*

<sup>1</sup> So there is a presumption of payment. Lapse of time during which no demand of a debt has been made, will, in a proper case, authorize a presumption that it has been paid. *Hopkins v. Page*, 2 Brock. 20; *Kirkpatrick v. Langphier*, 1 Cranch C. Ct. 85; *Miller v. Evans*, 2 Id. 72; *Anderson v. Smith*, 3 Metc. (Ky.) 491; *Helm v. Jones*, 3 Dana (Ky.) 86. The jury may presume a bond has been paid, after the lapse of a less time than twenty years, under peculiar circumstances; and in all cases, after that time has elapsed. *Dennison v. M'Keen*, 2 McLean, 253. The possession of a bond by the obligor, creates a presumption of its payment. *Carroll v. Bowie* 7 Gill (Md.) 34.

An entry made nineteen years previous to the trial, in the defendant's books, that a note of twenty-three years' standing was paid, was allowed to be read in evidence, to support the general presumption of payment after such a length of time. *Rodman v. Hoops*, 1 Dall. 85.

The obligee's endorsement of a payment on a bond, is not evidence to rebut the presumption of payment, unless made with the privity of the obligor. *Kirkpatrick v. Langphier*, 1 Cranch C. Ct. 85; *Cremer's Estate*, 5 Watts & S. (Pa.) 331. Though it seems, that evidence of the defendant's poverty and insolvency is evidence going to rebut presumption of payment. *Farmers' Bank v. Leonard*, 4 Har. (Del.) 536.

judicis non recipitur quæstio," (x) "Quæ in curia regis acta sunt, rite agi præsumuntur;" (y) public officers are presumed to do their duty; (z)<sup>1</sup> a parson is

Blackburn, 3 B. & S. 576, 578, note,

and the authorities there referred to.

(x) Bac. Max. Reg. 17.

(y) 3 Bulst. 43.

(z) 3 Stark. Ev. 936, 3rd Ed.; Simms

v. Henderson, 11 Q. B. 1015.

<sup>1</sup> Acts which purport to have been done by public officers, in their official capacity, and within the scope of their duty, will be presumed to have been regular and in accordance with their authority, until the contrary appears. *Ross v. Reid*, 1 Wheat. 482; *United States v. Arredondo*, 6 Pet 691; *Strother v. Lucas*, 12 Id. 410; *Philadelphia, &c. R. R. Co. v. Stimpson*, 14 Id. 448; *Delassus v. United States*, 9 Id. 117; *Wilkes v. Dinsman*, 7 How. 89; *Minter v. Crommelin*, 18 How. 87; 1355, *Russell v. Beebe*, Hempst. 704; *Den v. Hill*, 1 McAll. 480; *Dunlop v. Munroe*, 1 Cranch C. Ct. 536. Compare *Ruggles v. Bucknor*, 1 Paine, 358.

The presumption is that a sheriff who sells property on execution, has done his duty in previously making a levy. *Smith v. Hill*, 22 Barb. (N. Y.) 656.

And where property is sold by a sheriff in another state, it will be presumed that the deed given is in conformity with the laws of that state. *Sadler v. Anderson*, 17 Tex. 245.

The legal presumption is that public officers exercising their office have been duly sworn. *Nelson v. People*, 23 N. Y. 293.

Every officer acting under the sanction of an oath, or in whom government reposes trust, shall be presumed to have done his duty until the contrary be proved. *Hickman v. Boffman*, Hard. (Ky.) 348.

Though a commissioner, before whom a deposition is made, do not state that he personally knew the affiant, it will be so presumed, in the absence of evidence that the officer violated his duty. *Succession of Lauve*, 6 La. Ann. 530.

It can not be presumed that a licensed engineer who has taken an oath to perform his duties faithfully, would obey illegal orders of the captain in violation of his duty. *McMahon v. Davidson*, 12 Minn. 357.

Sworn public officers not charged with fraud must be supposed, until the contrary be shown, to have properly exercised the discretion vested in them by law. *Templeton v. Morgan*, 16 La. Ann. 438.



presumed to be always resident on his benefice; (*a*) a beneficed clergyman is presumed to have read the articles of the church, (*b*) and to have made the declaration required by 13 & 14 Car. 2, c. 4, relative to the uniformity of public prayer, (*c*) &c. So, oral evidence is not receivable of what the accused or the witnesses said when before the committing magistrate, unless there be positive proof that what they did say was not taken down in writing; (*d*) for the presumption of law is that the directions of the statutes in that behalf were obeyed. (*e*)<sup>1</sup> So, where goods seized for a distress are appraised and sold, according to the provisions of the 2 W. & M. c. 5, s. 2, st. 1, the sale will be presumed to have been for the best price that could be got for them. (*f*) And under the repealed statute, 13 Car. 2, c. 1, s. 12, st. 2, which required that all parties filling corporate offices, should have taken the sacrament according to the rights of the Church of England, within a year next before their election, every party filling such an office was presumed to have complied with the statute. (*g*)

**349.** 3. It is a principle of law nearly, if not altogether, as universal as the former, that "*Odiosa et inhonesta non sunt in lege præsumenda.*" (*h*) In furtherance of this, it is a maxim that fraud and covin are never presumed, (*i*) even in third parties whose

(*a*) Co. Litt. 78b.

(*b*) *Monke v. Butler*, 1 Rol. 83.

(*c*) *Powell v. Milburn*, 3 Wils. 355.

(*d*) 2 Ev. Poth. 335-6; *Phillips v. Wimburn*, 4 Car. & P. 273; *Parsons v. Brown*, 3 Car. & K. 295-6.

(*e*) See those statutes, *supra*, bk. 1 pt. 1, § 105.

(*f*) Com. Dig. Distress, D. 8.

(*g*) *R. v. Hawkins*, 10 East, 211.

(*h*) 10 Co. 56a.

(*i*) 10 Co. 56a; *Cro. El.* 292, pl. 2; *Cro. Jac.* 451; *Cro. Car.* 550; *Master v. Miller*, 4 T. R. 320, 333, per Buller, J.

<sup>1</sup> And so the law presumes that proper official care is taken of public files and records. *Hall v. Kellogg*, 16 Mich. 135.

conduct only comes in question collaterally. (*k*)<sup>1</sup> So the law presumes against vice and immorality; and, on this ground, presumes strongly in favor of marriage; (*l*) so that cohabitation and reputation are held to be presumptive evidence of marriage, (*m*) in all cases except in prosecutions for bigamy, and in cases where damages are claimed for adultery under the 20 & 21 Vict. c. 85, s. 33, in each of which proceedings an actual marriage must be proved. (*n*) The former of these exceptions seems to rest on the ground that the accused has the presumption of innocence in his favor; and the latter, partly on the ground that the proceeding is in the nature of a penal one; but chiefly because it might otherwise be turned to a bad purpose, by persons giving the name and character of wife to women to whom they had not been married.

One of the strongest illustrations of this principle (although resting also in some degree on grounds of public policy), is the presumption in favor of the legitimacy of children—"Semper præsumitur pro

(*k*) Per Buller, J., in *Ross v. Hunter*, 4 T. R. 33, 38.

(*l*) *Harrison v. The Burgesses of Southampton*, 4 De G., M. & G. 137; *Harrod v. Harrod*, 1 Kay & J. 4.

(*m*) Doed. *Fleming v. Fleming*, 4 Bing. 266; *Reed v. Passer*, 1 Peake, 233; *Sichel v. Lambert*, 15 C. B., N. S. 781, 787.

(*n*) *Morris v. Miller*, 4 Burr. 2057, *Birt v. Barlow*, 1 Dougl. 171; *Catherwood v. Caslon*, 13 M. & W. 261, 265. This last case is based on *R. v. Millis*, 10 Cl. & F. 534., as to which, see the observation of Willes, J., in *R. v. Manwaring*, 1 Dears. & B. 132, 139; and also *Beamish v. Beamish*, 9 Ho. Lo. Cas. 274.

<sup>1</sup> In equity, as well as law, fraud is never to be presumed without proof. *Hager v. Thomson*, 1 Blackf. 80. *S. P. Cooper v. Galbraith*, 3 Wash. 546; *Exp. Knowles*, 2 Cranch C. Ct. 576; *Robinson v. Quarles*, 1 La. Ann. 460; *Succession of Warren*, 4 Id. 451; *Martin v. Drumn*, 12 Id. 494; *Lesseps v. Weeks*, Id. 739; *Blaisdell v. Cowell*, 14 Me. 370; *Sulter v. Lackman*, 39 Mo. 91; *Roberts v. Guernsey*, 3 Grant (Pa.) Cas. 237; *Reeves v. Dougherty*, 7 Yerg. (Tenn.) 222; *Short Staple*, 1 Gall 104. See also *Gayso v. Delaroderie*, 9 La. Ann. 278.

legitimatione puerorum, et filiatio non potest probari.” (o) This is a *præsumptio juris et de jure*, that a child born after wedlock, of which the mother was, even visibly, pregnant at the time of marriage, is the offspring of the husband. (p) So every child born during wedlock, where the married parties are neither *infra nubile* annos, nor physically disqualified for sexual intercourse, is presumed legitimate; (q) according to the maxim “*pater est quem nuptæ demonstrant*,”—a presumption which holds even when the parties are living apart by mutual consent; but not when they are separated by a sentence pronounced by a court of competent jurisdiction; in which case obedience to the sentence of the court will be presumed. (r) In very ancient times this presumption of legitimacy was only *presumptio juris*; (s) but it was subsequently raised into a conclusive presumption, if the husband was within the four seas at any time during the pregnancy of the wife. (t) In later times, however, this has been very properly relaxed; and it is now competent to negative the fact of sexual intercourse between the parties during the time when, according to the course of nature, the husband could have been the father of the child. (u) But if the fact of sexual intercourse between the husband and wife within that time, has been established to the satisfaction of the tribunal, the

(o) 5 Co. 98b. See also Co. Litt. 126a.

(p) 1 Rol. Abr. Bastard, B.; Co. Litt. 244a; 1 Phill. Ev. 473, note 4, 10th Ed.

(q) 1 Rol. Abr. Bastard, B.

(r) *St. George's v. St. Margaret's*, 1 Salk. 123; *Sidney v. Sidney*, 3 P. Wms. 275.

(s) 1 Phill. Ev. 462, 10th Ed.

(t) Co. Litt. 224a; *R. v. Alberton*, 1 L. Raym. 395-6; *R. v. Murrey*, 1 Salk. 122.

(u) *Morris v. Davies*, 5 Cl. & F. 163; *R. v. The Inhabitants of Mansfield*, 1 Q. B. 441. And see *Legge v. Edmunds*, 25 L. J., Ch. 125; *Flowers v. Bossey*, 31 Ib. 681; *Atchley v. Sprigg*, 33 Ib. 345.

presumption can not be rebutted by proof of adultery ; as the law will not, in that case, allow a balance of evidence as to who was most likely to be the father of the child. (*x*)<sup>1</sup>

**350.** 4. Wrongful or tortious conduct will not be presumed, "*Injuria non præsumitur*;" (*y*) "*Nullum iniquum est in jure præsumendum*." (*z*) Thus, no species of ouster, such as disseisin, discontinuance, &c. will be presumed without proof, either direct or presumptive. (*a*) So when a party to any forensic proceeding tenders, in support of his case, a document which must be taken, *prima facie*, to be the property of another, the court will presume that he did not come by it in any tortious way. (*b*)<sup>2</sup> And where a person who is beyond the jurisdiction of a court, has in his possession a document required by that court, for the purposes of justice, it is not to be presumed that he will withhold it. (*c*)

**351.** 5. Want of religious belief, or irreligious conduct, will not be presumed. "All members of a

(*x*) *Banbury Peerage Case*, 1 Sim. & S. 155 ; *Head v. Head*, Id. 152 ; *Morris v. Davies*, 5 Cl. & F. 163 ; *Case of the Barony of Saye and Sele*, 1 Ho. L. Cas. 507 ; *Wright v. Holdgate*, 3 Car. & K. 138.

(*y*) Co. Litt. 232b.

(*z*) 4 Co. 72a.

(*a*) *Doe d. Fishar v. Prosser*, Cowp. 217. See Co. Litt. 42 a & b ; *Peaceable d. Hornblower v. Read*, 1 East, 568 ; *Thomas v. Thomas*, 2 Kay & J. 79.

(*b*) *Littleton*, sect. 375-377.

(*c*) *Boyle v. Wiseman*, 10 Exch. 617.

<sup>1</sup> Every child is presumed to be legitimate, and, in the absence of evidence to the contrary, no proof of marriage of the parents is necessary. Mere rumor of illegitimacy is not sufficient to require proof of marriage. *Strode v. Magowan*, 2 Bush. (Ky.) 621. Suspicions or rumors do not rebut this presumption. *Caujolle v. Ferrie*, 26 Barb. (N. Y.) 177. The presumption of legitimacy can not be rebutted by slight evidence. *Dinkins v. Samuel*, 10 Rich. (S. C.) 66 ; *Herring v. Goodson*, 43 Miss. 392.

<sup>2</sup> The law will never construe a possession tortious unless from necessity. *McEwen v. Portland*, 1 Oregon, 300.

Christian community being presumed to entertain the common faith, no man is supposed to disbelieve the existence and moral government of God." (*d*)

(*d*) 1 Greenl. Ev. § 42, 7th Ed.

<sup>1</sup> See the question whether Christianity is parcel of the common law of the United States, discussed in Morgan's "Law of Literature," vol. 1, pp. 33-35, 38, 39, 41-46. The author observes: "In so far, then, as Christianity in its popular sense is contradistinguished from barbarism or heathenism, in so far and in such sense as the Republic of the United States is reckoned among the Christian rather than among the heathen nations of the globe—we submit that Christianity is 'parcel of our common law.' . . . In concluding our examination of whether and to what extent 'Christianity is parcel of the common law of the United States,' we can not do better than adopt and make our own the words of Chancellor Kent, in *The People v. Ruggles*, 8 Johns. 291, believing that what he finds in this case, and in the contemplation of the constitution of the state of New York, will be found to be within the spirit of the unwritten law of the nation at large.

"The free, equal, and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and secured; but to revile with malicious and blasphemous contempt the religion professed by almost the whole community, is an abuse of that right. . . . We are not to be restrained from animadversion upon offenses against public decency, merely because there may be barbarous nations whose sense of shame would not be affected by what we should consider the most audacious outrages upon decorum. It is sufficient that the common law checks upon words and actions dangerous to the public welfare apply to our case, and are suited to the condition of this and every other people whose manners are refined, and whose morals have been elevated and inspired with a more enlarged benevolence, by means of the Christian religion.'

"The doctrine, however," concludes the author, "has not commanded the full assent of many learned minds. It was disputed by Jefferson (letter to Cartwright, 9 Am. Jurist; *Life and Letters of Joseph Story*, vol. 1, pp. 430-434; vol. 2, pp. 8, 461-464), and by eminent counsel in their arguments in the *Girard Will Case*). See, generally, as to the doctrine, *Lindenmuller v. The People*, 33 Barb. 548; *Bedford Charity*, 1 Swans. 517; *Da Costa v. Paz*, 2 Swans. 410 n.;

"Nemo præsumitur esse immemor suæ æternæ salutis, et maxime in articulo mortis;" (*e*) and "In his quæ sunt favorabilia animæ quamvis sunt damnosa rebus, fiat aliquando extensio statuti." (*f*) It is partly on this principle, that the declarations of a person who has met a violent end, made by him when under the conviction of his impending death, are, contrary to the general principle which excludes hearsay testimony, receivable in evidence against a party charged with being the cause of the death. (*g*) So, although by the Statute of Marlbridge (52 Hen III.), c. 6, a feoffment to a relative was deemed a collusive act, intended to deprive the lord of the fee of his wardship, no will of land devisable by the custom or devise of a use, before 34 Hen. 8, c. 5, could be impeached for such collusion. (*h*)

352. 6. All testimony given in a court of justice is presumed to be true until the contrary appears. (*i*) "La ley ne veut que on donne faux evidence." (*j*) This presumption seems based on four grounds: 1. A reliance on the truth of human testimony in general; (*k*) 2. That the law will not presume crime, (*l*) *i. e.* perjury; 3. That the law will not presume wrong, *i. e.* an intention to injure the party whom the evidence affects; and 4. That the law will not presume irreligion, (*m*) and consequently will not presume intentional false swearing.

(*e*) 6 Co. 76a.

(*f*) 10 Co. 101b.

(*g*) *Supra*, bk. 2, pt. 2, and *infra*, ch. 4.

(*h*) 2 Inst. 112; 6 Co. 76a.

(*i*) Cro. Jac. 601, pl. 26.

(*j*) Per Grevil, M. 20 H. VII., 11 B. pl. 21.

(*k*) Introd. pt. I, §§ 15 *et. seq.*

(*l*) *Ante*, § 346.

(*m*) *Ante*, § 351.

Att'y-Gen'l v. Pearson, 3 Mer. 399; Andrew v. N. Y. Bible & Prayer Book Soc., 4 Sandf. 157."

## SUB-SECTION IV.

## PRESUMPTIONS IN FAVOR OF VALIDITY OF ACTS.

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**353.** The important maxims, "Omnia præsumuntur rite esse acta;"<sup>1</sup> (*n*) "Omnia præsumuntur solenniter esse acta;" (*o*)<sup>2</sup> "Omnia præsumuntur legitime facta, donec probetur in contrarium,"<sup>3</sup> &c., (*p*) must not be understood as of universal application. (*q*) The extent to which presumptions will be made in support of acts, depends very much on whether they are favored or not by law, and also on the nature of the fact required to be presumed. The true principle

(*n*) 2 Ev. Poth. 335; 1 Phill. Ev. 480, 10th Ed.; 3 B. & C. 327; 7 Id. 790; 18 C. B. 45; 6 E. & B. 973; 13 C. B., N. S. 639.

(*o*) 12 Co. 4 & 5.

(*p*) Co. Litt. 232b; 8 Cl. & F. 144; 10 Cl. & F. 162.

(*q*) Many of our legal maxims are expressed with too great a degree of

generality: *e. g.* *Omnia præsumuntur rite esse acta*; *Omnia præsumuntur contra spoliatores*; *Omnis innovatio plus novitate perturbat quam utilitate prodest*; *Omnis definitio in lege periculosa*, &c. If definitions are dangerous in law, universal propositions are not less so.

<sup>1</sup> All things are presumed to have been done rightly.

<sup>2</sup> All things are presumed to have been done solemnly.

<sup>3</sup> All things are presumed to be legitimately done, until the contrary is proved.

intended to be conveyed by the rule, "*Omnia præsumuntur rite esse acta*," and the other expressions just quoted seems to be, that there is a general disposition in courts of justice to uphold official, judicial, and other acts, rather than to render them inoperative ; and with this view, where there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances, strictly speaking essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption rests solely on grounds of public policy.<sup>1</sup>

354. Taking a general view of the subject, the acts or things thus presumed are divisible into three classes. 1. Where, from the existence of posterior acts in a supposed chain of events, the existence of prior acts in the chain is inferred or assumed—*priora præsumuntur a posteribus*, (*r*)—as where a perspective right, or a grant is inferred from modern enjoyment. (*s*) 2. Where the existence of posterior acts is inferred from that of prior acts,—*præsumuntur posteriora a prioribus*,—as where the sealing and delivery of a deed purporting to be signed, sealed, and delivered, are inferred on proof of the signing only. (*t*) This is manifestly the reverse of the former, and as a general rule the presumption is much weaker. (*u*) 3.

(*r*) 3 Benth. Jud. Ev. 213.

(*s*) See *infra*, sub-sect. 5.

(*t*) *Infra*, § 362.

(*u*) "The probative force of posterior events in regard to prior ones is naturally much stronger than that of

prior events with regard to posterior ones. In all human affairs, execution is better evidence of design than design of execution. Why? Because human designs are so often frustrated." 3 Benth. Jud. Ev. 213, 215, 216.

<sup>1</sup> The principle has been held in the United States to apply only when jurisdiction is clearly vested. *Allen v. Sowerby*, 37 Md. 410; *Pittsburgh v. Walter*, 69 Pa. St., 365; and see *Hicks v. Haywood*, 4 Heisk. 598; *Markham v. Boyd*, 22 Gratt. 544; *Buchanan v. King*, Id. 414.



Where intermediate proceedings are presumed,—“*probat̄is extremis, pr̄æsumuntur media*,” (*x*)—as where livery of seisin is presumed on proof of a feoffment and twenty years’ enjoyment under it; (*y*) or where a jury are directed to presume mesne assignments. (*z*)

**355.** The real nature and extent of this principle will be best understood by the examination of decided cases, in which it has been recognized and acted on by the courts, and of others where it has been held not to apply. With this view it is proposed to consider it with reference, first, to official appointments; secondly, to official acts; thirdly, to judicial acts; fourthly, to extra-judicial acts. The application of this maxim in support of possession and user, especially where there has been long and peaceable enjoyment, will from its importance, be reserved for separate consideration. (*a*)

**356.** 1. With respect to official appointments. It is a general principle, that a person’s acting in a public capacity is *prima facie* evidence of his having been duly authorized so to do; (*b*) and, even though the office be one the appointment to which must have been in writing, it is not, at least in the first instance, necessary to produce the document or account for its non-production. (*c*) There are numerous instances to be found of the application of this principle. It has been

(*x*) 1 Greenl. Ev. § 20, 7th Ed.; Bl. 1228; White v. Foljambe, 11 Ves. White v. Foljambe, 11 Ves. 337, 350. 350.

(*y*) Doe d. Wilkins v. Marquis of Cleveland, 9 B. & C. 864; Rees d. Chamberlain v. Lloyd, Wightw. 123; Isack v. Clarke, 1 Ro. 132; Doe d. Lewis v. Davies, 2 M. & W. 503.

(*z*) Earl d. Goodwin v. Baxter, 2 W.

(*a*) *Infra*, sub-sect. 5.

(*b*) Ph. & Am. Ev. 452; 1 Phil. Ev. 449, 10th Ed.; Berryman v. Wise, 4 T. R. 366; M’Gahey v. Alston, 2 M. & W. 206.

(*c*) Ph. & Am. Ev. 452-3; 1 Phill. Ev. 449, 10th Ed.

1 Rowan v. Lamb, 4 Greene (Iowa) 468; Shelbyville v. Shelbyville, 1 Metc. (Ky.) 54; Landry v. Martin, 15 La. An 1; and cases cited in note 1, p. 622.

held to apply to justices of the peace, (*d*) church-wardens and overseers, (*e*) masters in chancery, (*f*) surrogates, (*g*) commissioners for taking affidavits, (*h*)<sup>1</sup> attorneys, (*i*) under-sheriffs, (*j*) replevin clerks, (*k*) peace officers and constables, (*l*) persons in the employment of the Post-office, (*m*) vestry clerks, (*n*) attested soldiers under the Mutiny Act, (*o*) &c.; and it has been expressly extended by statute to revenue officers. (*p*) And it holds in criminal cases as well as in civil. A strong illustration is to be found in *R. v. Winifred and Thomas Gordon*, (*q*) who were indicted for the murder of a constable in the execution of his

(*d*) *Berryman v. Wise*, 4 T. R. 366.

(*e*) *Doe d. Bowley v. Barnes*, 8 Q. B. 1037.

(*f*) *Marshall v. Lamb*, 5 Q. B. 115.

(*g*) *R. v. Verelst*, 3 Camp. 432.

(*h*) *R. v. James*, 1 Show. 397; *R. v. Howard*, 1 M. & Rob. 187.

(*i*) *Pearce v. Whale*, 5 B. & C. 38.

(*j*) *Doe d. James v. Brawn*, 5 B. & A. 243.

(*k*) *Faulkner v. Johnson*, 11 M. & W. 581.

(*l*) *R. v. Gordon, Leach*, C. L. 515; *Berryman v. Wise*, 4 T. R. 366, per Buller, J.

(*m*) *R. v. Rees*, 6 C. & P. 606.

(*n*) *M'Gahey v. Alston*, 2 M. & W. 206.

(*o*) *Wotton v. Gavin*, 16 Q. B. 48.

(*p*) 26 Geo. 3, c. 77, s. 12, and c. 82, s. 6; 11 Geo. 1, c. 30, s. 32; 7 & 8 Geo. 4, c. 53, s. 17; 16 & 17 Vict. c. 107, s. 307.

(*q*) *Leach*, C. L. 515, 4th Ed

<sup>1</sup> Where a registry copy of a deed, recorded more than one hundred years before, was produced in evidence, it appeared that the deed purported to have been acknowledged before a justice of the peace of another state. Held, that in the absence of evidence to the contrary, the presumption was that the register who recorded the deed, had sufficient evidence, at the time of record, of the official character of the magistrate; *Forsaith v. Clark*, 21 N. H. (1 Fost.) 409; and so even though a clerk of the United States courts has no authority to administer oaths out of court (but ample authority *coram judice*), the jurats attached to a petition and schedules of a bankrupt will be taken to have been verified in court, if not proved to be otherwise. *Schermerhorn v. Talman*, 14 N. Y. (4 Kern.) 93.

A breach of law can not be presumed, but the presumption is that every person has conformed to the law, until the contrary appear by proof, the burden of which is upon him who alleges it. *Horan v. Weiler*, 41 Pa. St. 470.

office, and where the allegation in the indictment of his being constable, was held sufficiently proved by evidence that he acted and was generally known in the parish as such. Both prisoners were convicted and Thomas Gordon executed, but the female prisoner escaped on another point.

**357.** This presumption is not restricted to appointments of a strictly public nature. It has been held to apply to constables and watchmen appointed by commissioners under a local act, (*r*) and to trustees empowered by act of parliament to raise money to build a church. (*s*) But it does not, at least in general, hold in the case of private individuals, or agents supposed to be acting by their authority. Thus it does not apply to an executor or administrator, (*t*) or a tithe-collector acting under the authority of a private person ; &c. (*u*)

**358.** This presumption of the due appointment of public officers seems to rest on three grounds : (*v*)  
 1. A principle of public policy. 2. In some degree on the ground, that in many cases, not to make it would be to presume that the party acting had been guilty of a breach of the law. 3. That in the case of public appointments, there are facilities for disproving the regularity of the appointment which do not exist in the case of the agents of private individuals.

(*r*) *Butler v. Ford*, 1 Cr. & M. 662.

(*s*) *R. v. Murphy*, 8 C. & P. 310, per Coleridge, J. The acts of Parliament in that case, namely, the 56 Geo. 3, c. xxix., and 1 & 2 Geo. 4, c. xxiv., are stated in the report to be private acts, but it appears that they contain clauses declaring them public acts.

(*t*) Previous to 15 & 16 Vict. c. 76, s. 55, executors and administrators

were bound, in pleading, to make proof of the probate, or letters of administration. 1 Chit. Pl. 420, 6th Ed.

(*u*) *Short v. Lee*, 2 Jac. & W. 468.

(*v*) Many of the cases in the books rest on a totally distinct ground, namely, that the party against whom the evidence was offered had, by words or acts, admitted the character of the person described as an officer

**359. 2.** The maxim, "*Omnia præsumuntur rite esse acta*," holds in many cases where acts are required to be done by official persons, or with their concurrence. Thus where, on the face of a composition deed executed under the bankruptcy act, 1861, (*w*) there was a written memorandum stating, amongst other things required by the act, that the deed had been duly registered pursuant to the provisions thereof; this was held to be *prima facie* evidence that an affidavit, containing certain particulars prescribed by the act was, in pursuance thereof, delivered to the registrar together with the deed. (*x*) So the courts will presume in favor of a return to a mandamus; (*y*) and where a parish certificate, which appeared to have been signed by only one churchwarden, had been allowed by two justices of the peace, a custom was presumed, for the parish to have only one churchwarden. (*z*) And Lord Kenyon laid it down, that everything is to be intended in support of orders of justices, as contradistinguished to convictions. (*a*) This must not, however, be understood to mean that presumptions will be made inconsistent with the manifest probabilities of the case. (*b*)

**360. 3.** We next come to the consideration of judicial acts. These, from their very nature, are in general susceptible of more regular proof; so that the maxim, "*Omnia præsumuntur rite esse acta*," has here a much more limited application. "With respect to the general principle of presuming a regularity of

(*w*) 24 & 25 Vict. c. 134, s. 192.

See also *R. v. Hinkley*, 12 East, 361 and *R. v. Bestland*, 1 Wils. 128.

(*x*) *Waddington v. Roberts*, L. Rep., 3 Q. B. 579. And see *Grindell v. Brendon*, 6 C. B., N. S. 698.

(*a*) *R. v. Morris*, 4 T. R. 552. See also *R. v. Stockton*, 5 B. & Ad. 546.

(*y*) *Per Buller, J.*, in *R. v. Lyme Regis*, 1 Dougl. 159.

(*b*) *R. v. Upton Gray*, 10 B. & C. 807.

(*z*) *R. v. Catesby*, 2 B. & C. 814.

procedure," says Sir W. D. Evans, "it may perhaps appear to be the true conclusion, that wherever acts are apparently regular and proper, they ought not to be defeated by the mere suggestion of a possible irregularity.<sup>1</sup> This principle, however, ought not to be carried too far, and it is not desirable to rest upon a mere presumption that things were properly done, when the nature of the case will admit of positive evidence of the fact, provided it really exists." (c) It is a principle that irregularity will not be presumed; (d)<sup>2</sup> and there are several instances to be found in the books, of the courts dispensing with formal proof of things necessary in strictness to give validity to judicial acts. Thus, a fine was presumed to have been levied with proclamation (e) even before 11 & 12 Vict. c. 70; and where a recovery has been suffered by a person who had power to do so, the maxim, "*Omnia præsumuntur rite esse acta*," applies, until the contrary appears. (f) So it is a rule, never to raise a presumption for the sake of overturning an award,<sup>3</sup> but,

(c) 2 Ev. Poth. 336.

3 M. & W. 68; James v. Heward, 3

(d) Macnam. Null. and Irregul. 42; G. & Dav. 264.

per Alderson, B., in Counce v. Rigby,

(e) 3 Co. 86b.

(f) 3 Stark. Ev. 961, 3rd Ed.

<sup>1</sup> Where proceedings are in the course of the ordinary jurisdiction of the court, as a court of law or a court of equity, many things may be presumed which do not appear upon the record, and evidence will not be permitted to contradict the presumptions arising from the acts of the court. *Tolmie v. Thompson*, 3 Cranch C. Ct. 123.

<sup>2</sup> An inferior court will be presumed to have acted correctly upon a subject-matter within its jurisdiction. *M'Grews v. M'Grews*, 1 Stew. & P. (Ala.) 30; *Outlaw v. Davis*, 27 Ill. 467; *Tharp v. Commonwealth*, 3 Metc. (Ky.) 411; *Slate v. Farish*, 23 Miss. 483; *Merritt v. Baldwin*, 6 Wis. 439; *Redmond v. Anderson*, 18 Ark. 449.

<sup>3</sup> And so where a license has been granted, it will be presumed that the court had evidence before them to justify them in granting it. *Commonwealth v. Bolkom*, 3 Pick. 281.

on the contrary, to make every reasonable intendment in its support; (*g*) although there are cases in the books which it might be difficult to reconcile with this principle.

**361.** The maxim "*Omnia præsumuntur rite esse acta*" does not apply to give jurisdiction to magistrates, or other inferior tribunals. (*h*) Thus, where a power was given to justices of the peace under a mutiny act, to take the examination of a soldier quartered at the place where the examination was taken; and the examination, when taken, did not show on the face of it that the soldier was quartered at that place; the Court of Queen's Bench held the examination not to be receivable for the purpose of proving a settlement, unless it were shown by evidence, that the soldier was so quartered at the time. (*i*)<sup>1</sup>

**362.** 4. We next proceed to consider the application of this maxim to extra-judicial acts, such as written instruments, and matters in pais. Thus, it is an established rule that deeds, wills, and other attested documents, which are thirty years old or upwards, and

(*g*) Caldwell, *Arbitr.* 132, 2nd Ed.; Watson, *Aw.* 175, 176, 3rd Ed.; Russell, *Arbitr.* 268, 681, 3rd Ed.; 3 Bulst. 66-7.

(*h*) *R. v. Hulcott*, 6 T. R. 583; *R. v. All Saints'*, Southampton, 7 B. & C. 785; *Carratt v. Morley*, 1 Q. B. 18;

*Dempster v. Purnell*, 4 Scott, N. R. 30; *Anon.*, 1 B. & Ad. 386, note; *R. v. Totness*, 11 Q. B. 80; *R. v. Bloomsbury*, 4 E. & B. 520.

(*i*) *R. v. All Saints'*, Southampton, 7 B. & C. 785.

<sup>1</sup> The strictness with which the proceedings of inferior tribunals are scrutinized, applies only to the question of jurisdiction. When that is established, the maxim "*omnia præsumuntur*," &c., applies to them as well as to courts of general jurisdiction; *State v. Hinchman*, 27 Pa. St. 479. So a justice of the peace will be presumed to have acted within his jurisdiction, although his entry of judgment is so made that its terms are applicable to a case in which he had no jurisdiction, as well as to one which he had. *Bumpus v. Fisher*, 21 Tex. 561.

are produced from an unsuspected repository, prove themselves; although it is still competent to the opposite party, to call witnesses to disprove the regularity of the execution. (*k*) And there are many instances of the application of this presumption, even where it is strictly necessary to prove the execution of an attested instrument. Thus, where a deed is produced, purporting to have been executed in due form by signing, sealing, and delivery, but the attesting witnesses can only speak to the fact of signing, it may be properly left to the jury to presume a sealing and delivery. (*l*) So, where an agreement is stated to have been reduced to writing, signing will be presumed. (*m*)<sup>1</sup>

**363.** The 7 Will. 4 & 1 Vict. c. 26, s. 9 (explained by 15 & 16 Vict. c. 24), requires wills to be in writing and executed with certain formalities; and somewhat similar provisions, with reference to wills of real estate, were contained in the statute previously in force, the 29 Car. 2, c. 3, s. 5. (*n*) Under both statutes the

(*k*) 2 Phill. Ev. 245 *et seq.* 10th Ed.  
Vide *supra*, bk. 2, pt. 3, chap. 1, §§  
220-1.

Grellier v. Neale, 1 Peake, 146; Talbot v. Hodson, 7 Taunt. 251.

(*m*) Rist v. Hobson, 1 Sim. & S.

(*l*) Burling v. Paterson, 9 C. & P. 543.  
570; Ball v. Taylor, 1 C. & P. 417;

(*n*) *Supra*, bk. 2, pt. 3, chap. 1 § 222.

<sup>1</sup> So the law presumes that an instrument was executed the day it bears date, but parol testimony is admissible to show that it was in fact executed on a different day; *Abrams v. Pomeroy*, 13 Ill. 133; *Meldrum v. Clarke*, 1 Morr. (Iowa) 130; *Breck v. Cole*, 4 Sandf. (N. Y.) 79; *Dodge v. Hopkins*, 14 Wis. 630; but the party alleging an alteration of a written instrument has the burden of proof upon him to show the alteration; *Davis v. Jenney*, 1 Metc. (Ky.) 221; and where an instrument is offered in evidence, in which an interlineation has been made, and there is no evidence either from the appearance of the note or otherwise as to when the interlineation was made, it will be presumed to have been subsequent to the execution of the instrument. *Walters v. Short*, 10 Ill. (5 Gilm.) 252.

courts have, in many instances, applied the maxim "Omnia præsumuntur rite esse acta," to the execution of wills; and as a general principle, they lean in favor of a fair will, so as not to defeat it for a slip in form, where the intention of the legislature has been complied with. (o)

364. So, collateral facts requisite to give validity to instruments will, in general, be presumed. Thus, where an instrument has been lost, it will be presumed to have been duly stamped; (p) and where a party refuses to produce a document after notice, it will be presumed, at least as against him, to have been duly stamped, unless the contrary appears. (q) Where an ejectment was brought on the assignment of a term, given by the defendant to secure the payment of an annuity, it was held unnecessary for the plaintiff to prove, that the annuity had been enrolled in pursuance of the 17 Geo. 3, c. 26; as, if it were not enrolled, that would more properly come from the other side. (r) This principle has also been extended to the construction of instruments. Thus, where deeds bear date on the same day, a priority of execution will be presumed, to support the clear intention of parties; (s) as, for instance, where property was conveyed by lease, and release, both of which were contained in one deed, the presumption was, that the lease had been executed first. (t)<sup>1</sup> So, in construing a deed or will, words may

(o) *Right, Lessee of Cater v. Price*, 1 Dougl. 241, 243; *Bond v. Seawell*, 3 Burr. 1773; 1 Jarman, Wills, 75 *et seq.*; In the goods of Huckvale, L. Rep., 1 P. & D. 375.

(p) *Supra*, § 230.

(q) *Id.*; *Crisp. v. Anderson*, 1 Stark.

35.

(r) *Doe d. Griffin v. Mason*, 3 Camp.

7. See acc. *Doe d. Lewis v. Bingham*, 4 B. & A. 672; and *The Brighton Railway Company v. Fairclough*, 2 Man. & G. 674.

(s) *Barker v. Keete*, 1 Freem. 251; *Taylor d. Atkyns v. Horde*, 1 Burr. 106.

(t) Per North, C. J., in *Barker v. Keete*, 1 Freem. 251.

<sup>1</sup> *Abrams v. Pomeroy*, 13 Ill. 133. Where an instrument



be transposed, in order to carry into effect the manifest intention of the parties. (*u*)

**365.** It only remains to add, that the principle in question has been much extended by modern statutes. We have already alluded to this subject, when treating of the history of the rise and progress of the English law of evidence. (*v*)

(*u*) *Parkhurst v. Smith*, Willes, 327, *Richards v. Bluck*, 6 C. B. 441. 332; and the cases there cited; (*v*) Bk. I, pt. 2, § 118.

without date provides for the payment of a sum of money on the 1st of May, 1838, the presumption is that it was made before that time; *Cleavinger v. Reiar*, 3 Watts & S. (Pa.) 486. An impossible date raises a presumption of ante or post dating; and not of alteration. *Davis v. Loftin*, 6 Tex. 489.

## SUB-SECTION V.

## PRESUMPTIONS FROM POSSESSION AND USER.

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**366.** The presumption of right in a party who is in the possession of property, or of that quasi possession of which rights only occasionally exerciseable are susceptible, is highly favored in every system of jurisprudence, (*w*) and seems to rest, partly on principles of natural justice, and partly on public policy. By the law of England, possession, or quasi possession, as the case may be, is *prima facie* evidence of property, (*x*)—"Melior (potior) est conditio possidentis"; (*y*) and the possession of real estate, or the perception of the rents and profits from the person in possession, is *prima facie* evidence of the highest estate in that property, namely, a seisin in fee. (*z*) But the strength of the presumption, arising from possession of any kind, is materially increased by the length of the time of enjoyment, and the absence of interruption or disturbance from others who, supposing it illegal, were interested in putting an end to it. The rule is, that where the facts show the long continued exercise of a right, the court is bound to presume a legal origin, if such be possible, in favor of the right. (*a*) And, in such cases, the courts have presumed not only that the right had a legal origin, but many collateral facts, so as to render the title of the possessor complete,—according to the maxim, "*Ex diuturnitate temporis, omnia præsumuntur solenniter esse acta.*" (*b*) •

**367.** In treating this important subject, it is pro-

(*w*) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 16; Dig. lib. 50, tit. 17, ll. 126 & 128; Cod. lib. 4, tit. 19, l. 2; Sext. Decret. lib. 5, tit. 12, De Reg. Jur., Reg. 65; Co. Litt. 6b.

(*x*) Ph. & Am. Ev. 472; 1 Ph. Ev. 484, 10th Ed.; 4 Taunt. 547; 2 Wms. Saund. 47f, 6th Ed.

(*y*) 2 Inst. 391; 4 Id. 180; Plowd. 296; Hob. 103, 199; Vaugh. 60; 1 T.

R. 153; 4 Id. 564.

(*z*) B. N. P. 103; Jeyne v. Price, 5 Taunt. 326; Denn d. Tarzwell v. Barnard, Cowp. 595; Crease v. Barrett, 1 C. M. & R. 931; R. v. Overseers of Birmingham, 1 B. & S. 763, 768, 770; Metters v. Brown, 1 H. & C. 686, 692.

(*a*) Johnson v. Barnes, L. R., 7 C. P. 592; S. C., in Cam. Scac., 8 Id. 527.

(*b*) Co. Litt. 6b; Jenk. Cent. 4 Cas.

posed to consider, 1st, The presumption from long user, of prescriptive and other rights, to things which lie in grant, both at common law, and as affected by the statutes 2 & 3 Will. 4, cc. 71, and 100. 2ndly, Incorporeal rights not affected by those statutes. 3rdly, Presumptions of facts in support of beneficial enjoyment.

368. Among the various ways in which a title to property can be acquired, most systems of jurisprudence recognize that of "prescription," or undisturbed possession or user for a period of time, longer or shorter as fixed by law. (c)<sup>1</sup> "*Præscriptio est titulus*

77; Palm. 427. This maxim is clearly posterioribus. See *suprà*, sub-sect. 4, a case where *priora præsumuntur à* § 354.

(c) Introd. Part 2, § 43.

<sup>1</sup> But this title by possession is never to be presumed; it must be actually proved to rebut a prior title; *Rochell v. Holmes*, 2 Bay (S. C.) 487. Although all reconcilable in principle, the enunciations upon this subject are not always uniform in detail—subjoined are a few of the different forms in which we find the rule treated:

In order to quiet titles after a great lapse of time, presumptions will sometimes be made against the known facts of a case. *Riddlehoner v. Kinard*, 1 Hill (S. C.) Ch. 376.

A party who destroys the evidence by which his claim or title may be impeached, raises a strong, though not conclusive, presumption against the validity of his claim. *Thompson v. Thompson*, 9 Ind. 323.

It is for the party who sets up a title to produce the evidence necessary to support it. If the validity of a deed depends on an act in pais, the party claiming under the deed is as much bound to prove the performance of the act, as to prove any matter of record on which its validity might depend. *Williams v. Peyton*, 4 Wheat. 77.

From very long possession of the land, the payment of taxes, &c., the jury may presume a conveyance; *Cheaney v. Watkins*, 1 Har. & J. (Md.) 527; but a title can not be presumed to have been perfected, where deeds showing a defective title are produced. *Owings v. Norwood*, 2 Har. & J. (Md.) 96.

ex usu et tempore, substantiam capiens ab autoritate legis." (d) According to the common law of England, this species of title can not be made to land or

(d) Co. Litt. 113a.

The burden of proof is on the purchaser to show loss or waiver of a vendor's lien. *Hays v. Horine*, 12 Iowa, 61.

An executory contract for land, with twenty years' possession, being shown, the presumption of a legal conveyance may be rebutted by evidence tending to the contrary conclusion. *Chiles v. Conley*, 2 Dana (Ky.) 21.

After a possession of fifty years, under a deed made by an agent, it will be presumed that the agent was authorized to execute the deed. *Jarboe v. McAtee*, 7 B. Mon. 279.

Where plats on file in a commissioner's office correspond substantially with the description of land in a certificate of confirmation, it will be presumed that the confirmation was made in reference to them. *Beatty v. Michon*, 9 La. Ann. 102.

Where a widow had held a parcel of her husband's estate for nearly thirty years, under a deed in fee from one of the heirs,—Held, that in an action by another of the heirs for an undivided portion of the same land, it could not be presumed, against the deed under which she had entered and claimed, that she held as tenant in dower. *Hale v. Portland*, 4 Me. (4 Greenl.) 77.

It is presumed, where the lots of lands in each range, in a new township, are numbered in a regular arithmetical series, that they were originally located contiguous to each other, and that a lot numbered two, includes all the land lying between one and three in the same range; and so of the others. *Warren v. Pierce*, 6 Me. (6 Greenl.) 9.

Ancient deeds of lands, of which the grantee has entered into possession, are to be upheld, although defective in form or execution; and the same rule may be applied to wills and levies of executions, to a certain extent. *Hill v. Lord*, 48 Me. 83.

Possession of personal property with the consent of the true owner does not raise a legal presumption of title against such owner. *Ib.*

Possession of land is evidence of title, to be left to a jury. *Wendell v. Blanchard*, 2 N. H.

It is not true in all cases that a man claiming to own land is bound to know the state of his own title. *Davis v. Davis*, 26 Cal. 23.

corporeal hereditaments, (*e*) or to such incorporeal rights as must arise by matter of record; (*f*) and it is in general restricted to things which may be created by grant, (*g*) such as rights of common, easements, franchises which can be created by grant without record, &c. The reason for this is said to be, that every prescription supposes a grant, or some equivalent document, to have once existed, and to have been lost by lapse of time. (*h*) According to some eminent authorities, no claim by prescription could be made at the common law against the Crown, (*i*) on the principle "nullum tempus occurrit regi."

(*e*) Dr. & Stud. Dial. 1, c. 8; Finch, Comm. Laws, 31; Vin. Abr. Presc. B. pl. 2; Brooke, Abr. Presc. pl. 19; Wilkinson v. Proud, 11 M. & W. 33. A man may, however, prescribe to hold land as tenant in common with another. (Littleton, sect. 310; Brooke, Abr. in loc. cit. and Trespass, 122.)

(*f*) Co. Litt. 114a; 5 Co. 109b; Com. Dig. Franchises, A. 2.

(*g*) 2 Blackst. Comm. 265; 3 Cruise's Dig. 423, 4th Ed.; 1 Vent. 387.

(*h*) 2 Blackst. Comm. 265; Butl. Co. Litt. 261a, note (1); Potter v. North, 1 Vent. 387. 13 Hen. VII. 16 B. pl. 14.

(*i*) 2 Ro. Abr. 264, Prescription, C.; Com. Dig. Presc. F. 1; Plowd. 243; 38 Ass. pl. 22. See, however, Plowd. 322; Hargr. Co. Litt. 119a, note (1); 114 b; 2 Inst. 168. It is difficult to see the

That a party has been a long while in possession of land never sold for taxes, affords a presumption that he has complied with a covenant to pay certain old taxes. *Newson v. Davis*, 20 Tex. 419.

Length of time may properly induce a jury to presume a grant in support of a possession, which presumption may be repelled or accounted for. *Hurst v. M'Neil*, 1 Wash. 70. *S. P. Jefferson County v. Ferguson*, 13 Ill. 33; *Farrar v. Merrill*, 1 Me. (1 Greenl.) 17.

The presumption of a grant arising from long possession, is repelled and destroyed by production of proof of the contents of an instrument under which the possession was held; *Nieto v. Carpenter*, 21 Cal. 455; and see *ante*, p. 574, note 1, as to certain circumstances under which a deed will be presumed. It seems that the law never presumes the existence of a will in the absence of proof; nor, after its existence has been proved, will it presume that it embraced the real as well as the personal property of the testator. *Duke of Cumberland v. Graves*, 9 Barb. (N. Y.) 595.

**369.** Customary rights differ from prescriptive in this, that the former are usages applicable to a district or number of persons, while the latter are rights claimed by one or more individuals, or by a corporation, (*k*) as existing either in themselves and their ancestors or predecessors, or as annexed to particular property. (*l*) The latter is called prescribing in a que estate, or, in other words, laying the prescription in the party and those whose estate he has. And here it is necessary to observe that, at the common law, every prescription must have been laid in the tenant of the fee simple; and that parties holding any inferior interest in the land could not prescribe, by reason of the imbecility of their estates; but were obliged to prescribe under cover of the tenant in fee, by alleging his immemorial right to the subject-matter of the claim, and deducing their own title from him. (*m*)<sup>1</sup>

**370.** A prescriptive or customary right, in order to be valid, must have existed undisturbed from time immemorial; (*n*) by which, at the common law, was meant, as the words imply, that no evidence, verbal or written, could be adduced of any time when the right was not in existence; (*o*) and the right was pleaded, by alleging it to have existed "from time whereof the memory of man runneth not to the contrary." (*p*)

reason of this, if it be true, as stated in most of the books, that every prescription presupposes a grant before the time of legal memory (see the preceding note); and it is well known that a grant within the time of legal memory may be presumed against the Crown. (*Infra.*) The maxim "*nulum tempus occurrit regi*" was modified by 9 Geo. 3, c. 16, and 32 Geo. 3, c. 58, and other modern statutes.

(*k*) Co. Litt. 113b; 4 Co. 32a; 3 Cruise's Dig. 422, 4th Ed.

(*l*) Co. Litt. 113b, 121a; 2 Blackst. Comm. 265.

(*m*) 2 Blackst. Comm. 264, 265.

(*n*) 1 Blackst. Comm. 76; Litt. sect. 170.

(*o*) Co. Litt. 115a; Litt. sect. 170.

(*p*) Litt. sect. 170; 2 Ro. Abr. 269, Prescrip. M. pl. 16.

<sup>1</sup> But see *Glass v. Gilbert*, 58 Pa. St. 266.

But when the stat. West. 1 (3 Edw. I.), c. 39, had fixed a time of limitation in the highest real actions known to the law, it was considered unreasonable to allow a longer time in claims by prescription. Accordingly, by an equitable construction of that statute, a period of legal memory was established—in contradistinction to that of living memory—by which every prescriptive claim was deemed indefeasible, if it had existed from the first day of the reign of Richard I. (A. D. 1189); (*q*) and, on the other hand, to be at once at an end if shown to have had its commencement since that period. (*r*)

**371.** After the time of limitation had been further reduced to sixty years by 32 Hen. 9, c. 2, and in many cases, including the action of ejectment, to twenty years by 21 Jac. 1, c. 16, it might have been expected that, by a similar equitable construction, the time of prescription would have been proportionably shortened. This, however, was not done, and it remained as before. (*s*) But the stat. 32 Hen. 8, c. 2, affected the subject in this way, that whereas, previously, a man might have prescribed for a right, the enjoyment of which had been suspended for an indefinite number of years, it was thereby enacted, that no person should make any prescription by the seisin or possession of his ancestors or predecessors, unless such seisin or possession had been within sixty years, next before such prescription made.

**372.** A prescriptive title once acquired may be destroyed by interruption. But this must be understood to be an interruption of the right, not simply an interruption of the user. (*t*) Thus a prescriptive

(*q*) Co. Litt. 115a.

(*r*) Id.; 2 Blackst. Comm. 31; 2 Inst.

238; 3 Cruise's Dig. 425, 4th Ed.

(*s*) 2 Blackst. Comm. 31, n. (22); Gale on Easements, 89, 3rd Ed.

(*t*) Co. Litt. 114b; Canham v. Fisk, 2 C. & J. 126, per Bayley, B.



right may be lost or extinguished by an unity of possession of the right, with an estate in the land as high and perdurable as that in the subject-matter of the right ; (u) as, for instance, where a party entitled in fee to a right of way or common, becomes seized in fee of the soil to which it is attached. But the taking any lesser estate in the land only suspends the enjoyment of the subject-matter of the prescription, without extinguishing the right to it, which accordingly revives on the determination of the particular estate. (x)

**373.** The time of prescription thus remaining unaltered, it is obvious that, if strict proof were required of the exercise of the supposed right up to the time of Richard I., the difficulty of establishing a prescriptive claim must have increased with each successive generation. The mischief was, however, considerably lessened by the rules of evidence established by the courts. Modern possession and user being *prima facie* evidence of property and right, the judges attached to them an artificial weight, and held that when uninterrupted, uncontradicted, and unexplained, they constituted proof from which a jury ought to infer a prescriptive right, coeval with the time of legal memory.

The length of possession and user necessary for this purpose, depends in some degree on circumstances and the nature of the right claimed. On a claim of *modus decimandi*, where there is nothing in the amount of the sum alleged to be payable in lieu of tithe, inconsistent with its having been an immemorial payment, the regular proof should be payment of that amount in lieu of tithe, by the parish, township, or

(u) 3 Cruise's Dig. 428, 4th Ed. ; mitage, Carth. 241.  
Co. Litt. 114b ; 4 Co. 38a ; R. Her- (x) 3 Cruise's Dig. 426, 4th Ed.

farm, as far back as living memory will reach ; coupled with evidence that, during that period, no tithes in kind have ever been paid in respect to that parish, township, or farm. (y) So, generally, in the case of other things to which a title may be made by prescription, proof of enjoyment as far back as living memory, raises a presumption of enjoyment from the remote era. (z) And a like presumption may be made from an uninterrupted enjoyment for a considerable number of years.<sup>1</sup> “*M*,” says Alderson, B., in the case of *Jenkins v. Harvey*, (a) “an uninterrupted usage of upwards of seventy years unanswerd by any evidence to the contrary, were not sufficient to establish a right like the present” (*i. e.* a right to a toll on all coal brought into a port), “there are innumerable titles which could not be sustained.” In that case—the judge at nisi prius having directed the jury that he was not aware of any rule of law which precluded them from presuming the immemorial existence of the right from the modern usage—the Court of Exchequer held the direction improper ; and that the correct mode of presenting the point to the jury would have been that, from the uninterrupted modern usage, they should find the immemorial existence of the payment, unless some evidence was given

(y) *Bree v. Beck*, 1 Younge, 244 ;  
*Chapman v. Monson*, 2 P. Wms. 565 ;  
*Moore v. Bullock*, Cro. Jac. 501 ;  
*Lynes v. Lett*, 3 Y. & J. 405 ; *Chap-*  
*man v. Smith*, 2 Vez. sen. 506.

(z) First Report of Real Property  
 Commissioners, 51 ; *Blewett v. Tre-*  
*gonning* 3 A. & E. 554, per Little-  
 dale, J. ; *R. v. Carpenter*, 2 Show. 48.  
 (a) 1 C. M. & R. 895.

<sup>1</sup> So no adverse appropriation or use of land for a road short of twenty years, is sufficient in Maine to raise presumption of a grant, nor to impose on a town the obligation of keeping it in repair. *Rowell v. Montville*, 4 Me. (4 Greenl.) 270, and see *Brandt v. Ogden*, 1 Johns. 156 ; *Palmer v. Hicks*, 6 Id. 133.

to the contrary. (*b*) And so where the question was whether a certain mode of fishing in a river could be considered as lawfully in use at the time of the passing of the salmon fishery act, 1861, (*c*) by virtue of a grant within the meaning of sect. 12 of that act: and there was evidence that the mode of fishing in question, had been enjoyed for sixty years and as far back as living memory extended, in substantially the same manner as it was in 1861; the court held, that the commissioners under the act might and ought to have found, that the right of fishing in that particular way did exist, by grant from all the proprietors in the river whose interests could be affected thereby. (*d*)

In an old case of *Bury v. Pope*, (*e*) it was agreed by all the judges, that a period of thirty or forty years was insufficient to give such a title to lights, as would enable the owner of the land to maintain an action against the possessor of the adjoining soil for obstructing them. But this is inconsistent with the modern cases of *Cross v. Lewis* (*f*) and *R. v. Joliffe*. (*g*) The latter of these was a quo warranto, calling on the defendant to show upon what authority he claimed to exercise the office of mayor of the borough of Petersfield. The defendant set up an immemorial custom, for the jury of the court leet to present a fit person to be mayor of the borough, who presented him, the defendant; to which the crown replied an immemorial custom, for the court leet to present a fit person to be bailiff, and that at the court by which the defendant

(*b*) 1 C. M. & R. 877; and see *Shephard v. Payne*, 16 C. B., N. S. 132; *Lawrence v. Hitch*, L. Rep., 3 Q. B. 521, 532. Vide *supra*, sect. 1, sub-sect. 2, § 326.

(*c*) 24 & 25 Vict. c. 109.

(*d*) *Leconfield v. Lonsdale*, L. Rep. 5 C. P. 657.

(*e*) Cro. El. 118.

(*f*) 2 B. & C. 686.

(*g*) Id. 54.

was presented to be mayor, the steward nominated the persons composing the jury, and issued his precept to the bailiff to summon them, who did so accordingly ; whereas by the law of the land, the steward should have issued his precept to the bailiff to summon a jury, and the particular persons should have been selected by the bailiff. To this the defendant rejoined, that from time immemorial the steward used to nominate the jurors ; and at the trial it was proved that for more than twenty years such had been the practice. This was not answered by any evidence on the part of the crown ; and thereupon Burrough, J., who tried the case, told the jury that slight evidence, if uncontradicted, became cogent proof ; and a verdict was given for the defendant. A rule was obtained for a new trial, on the ground that there was not sufficient evidence to warrant the finding of the jury ; and Abbott, C. J., after argument, expressed himself as follows : “ Upon the evidence given, uncontradicted, and unexplained, I think the learned judge did right in telling the jury that it was cogent evidence, upon which they might find the issue in the affirmative. If his expression had gone even beyond that, and had recommended them to find such a verdict, I should have thought that the recommendation was fit and proper. A regular usage for twenty years, not explained or contradicted, is that upon which many private and public rights are held, there being nothing in the usage to contravene the public policy.” Holroyd and Best, JJ., concurring, the rule was discharged.

**374.** Where there is general evidence of a prescriptive claim extending over a long time, the presumption of a right existing from time immemorial, will not be defeated by proof of slight, partial, or occasional variations in the exercise or extent of the

right claimed. This subject is well illustrated by the case of *R. v. Archdall*. (*h*) In delivering the judgment of the court in that case, Littledale, J., says: (*i*) “It follows almost necessarily, from the imperfection and irregularity of human nature, that a uniform course is not preserved during a long period; a little advance is made at one time, a retreat at another; something is added or taken away, from indiscretion, or ignorance, or through other causes: and when by the lapse of years the evidence is lost which would explain these irregularities, they are easily made the foundation of cavils against the legality of the whole practice. So, also, with regard to title: if that which has existed from time immemorial, be scrutinized with the same severity which may properly be employed in canvassing a modern grant, without making allowance for the changes and accidents of time, no ancient title will be found free from objection: that, indeed, will become a source of weakness, which ought to give security and strength. It has therefore always been the well-established principle of our law, to presume everything in favor of long possession; and it is every day’s practice to rest upon this foundation, the title to the most valuable properties.” There are several other cases illustrative of this principle. Thus although, in the case of a farm or district modus, the occupiers are bound, in order to establish the prescription, to show with reasonable precision, the description and boundaries of the lands said to be covered by it, and the identity of the lands for which the respective sums in lieu of tithes have been paid; still it has frequently been held in courts of equity, that a trifling and immaterial variation, in the evidence as to the boundaries of farms forming part of a district of

(*h*) 8 A. & E. 281.

(*i*) P. 288.

considerable extent, when the greater part of such boundaries are tolerably certain, is not sufficient to destroy the modus payable in lieu of the tithes of land proved to be within such boundaries. (*j*) So, again, in the case of *Bailey v. Appleyard*, (*k*) it is laid down by Coleridge, J., that a plea of prescription will be supported by proof of a prescriptive right larger than that claimed, but of such a nature as to include it. And in *Welcome v. Upton*, (*l*) Alderson, B., asks, "Would the claim of a party to a right of way be defeated, by showing that some person had narrowed it by a few inches?" On the other hand, however, a general prescription is not supported by proof of a prescriptive right coupled with a condition. (*m*)

**375.** Although the user is not sufficiently long or uniform to raise the presumption of a prescriptive right, still it is entitled to its legitimate weight as evidence from which, coupled with other circumstances, the jury may find the existence of the right.

**376.** The presumption of prescriptive right, derived from enjoyment however ancient, is instantly put an end to when the right is shown to have originated within the period of legal memory; (*n*) and it is of course liable to be rebutted by any species of legitimate evidence, direct or presumptive; (*o*) or even by the nature of the alleged right itself, which may make it impossible that it should have existed from the time

(*j*) *Bailey v. Sewell*, 1 Russ. 239; *Rudd v. Wright*, 1 Younge, 147; *Rudd v. Champion*, Id. 173; *Bree v. Beck*, Id. 211. See *Ward v. Pomfret*, 1 Man. & Gr. 559.

(*k*) 8 A. & E. 161, 167. See *The Bailiffs of Tewkesbury v. Bricknell*, 1 Taunt. 142.

(*l*) 6 M. & W. 536, 540.

(*m*) *Paddock v. Forrester*, 3 Scott, N. R. 715; 3 M. & Gr. 903, and the cases there cited.

(*n*) 2 Blackst. Com. 31; *Fisher v. Lord Graves*, 3 E. & Y., Tithe C. 1180.

(*o*) See *Taylor v. Cook*, 8 Price, 650, and the cases cited in the preceding notes.

of Richard I. (*p*) The existence of an ancient grant without date is not, however, necessarily inconsistent with a prescriptive right; for the grant may either have been made before the time of legal memory, or in confirmation of a prescriptive right. (*q*) So, in *Scales v. Key*, (*r*)—which arose on a question of an alleged false return to a mandamus, the issue being as to the existence of an immemorial custom within the city of London,—the jury found that the custom existed up to 1689; and, there being no proof of its having been either exercised or interfered with at any later time, this was held sufficient to entitle the defendants, who alleged the custom, to have the verdict entered in their favor. So, in *Biddulph v. Ather*, (*s*) where, in support of a prescriptive right to wreck, evidence was adduced of uninterrupted usage for ninety-two years, it was held not to be conclusively negatived by two allowances in eyre four hundred years previous, and a subsequent judgment in trespass; and the judge having left the whole case to the jury, who found in favor of the claim, the court refused to disturb the verdict. So, a prescriptive claim to right of way for the defendant and his servants, tenants and occupiers of a certain close; and a justification as his servant and by his command, is not necessarily disproved by showing, that the land had, fifty years before, been part of a large common, which was inclosed under the provisions of an inclosure act, and allotted to the ancestor of the defendant. And, the jury having found for the defendant, a rule obtained to enter a verdict for the plaintiff, was discharged after argument,—Parke, J..

(*p*) See *Bryant v. Foot*, L. Rep., 2 Q. B. 161; (in Cam. Scac.) 3 Ib. 497.

(*q*) *Addington v. Clode*, 2 W. Bl. 989.

(*r*) 11 A. & E. 819. See also *Welcome v. Upton*, 6 M. & W. 536.

(*s*) 2 Wils. 23.

observing that there was no rule of law which militated against the finding; because, from the usage, the jury might infer that the lord, if the fee were in him before the inclosure, had the right of way. (*t*) So it is laid down by Sir J. Leach, V. C., that, in the case of a *modus decimandi*, ancient documents can not prevail against all proof of usage, unless they are consistent with each other, and unless the effect of them excludes, not the probability, but the possibility of the *modus*. (*u*)

**377.** Notwithstanding the desire of the courts to uphold prescriptive rights, there were many cases in which the extreme length of the time of legal memory exercised a very mischievous effect; as the presumption from user, however strong, was liable to be altogether defeated, by showing the origin of the claim at any time since the 1 Rich. I. (A. D. 1189). Besides, possession and user are in themselves legitimate evidence of the existence of rights created since that period, the more obvious and natural proofs of which may have perished by time or accident. "Tempus," says Sir Edward Coke, "est edax rerum; (*v*) and records and letters patent, and other writings, either consume or are lost or embezzled: and God forbid that ancient grants and acts should be drawn in question, although they can not be shown, which, at the first was necessary to the perfection of the thing." (*w*) Acting partly on this principle, but chiefly for the furtherance of justice and the sake of peace, by quieting possession, (*x*) the judges attached an artificial weight to the possession and user of such matters as

(*t*) *Codling v. Johnson*, 9 B. & C. 933. See further on this subject, *Hill v. Smith*, 10 East, 476; *Schoobridge v. Ward*, 3 M. & Gr. 896.

(*u*) *White v. Lisle*, 4 Madd. 224.

(*v*) 12 Co. 5.

(*w*) *Ib.*

(*x*) *Bright v. Walker*, 1 C. M. & R. 217; *Eldridge v. Knott*, Cowp. 215.



lie in grant, where no prescriptive claim was put forward; and in process of time they established it as a rule, that twenty years' adverse and uninterrupted enjoyment of an incorporeal hereditament, uncontradicted and unexplained, was cogent evidence from which the jury should be directed conclusively to presume a grant, or other lawful origin of the possession (y) This period of twenty years seems to have been adopted by analogy to the Statute of Limitations, 21 Jac. 1, c. 16, which makes an adverse enjoyment for twenty years a bar to an action of ejectment. For, as an adverse possession of that duration gave a possessory title to land itself, it seemed reasonable that it should afford a presumption of right to a minor interest arising out of the land. (z) The practical effect of this quasi *præsumptio juris*, was considerably increased by the decision in *Read v. Brookman*, (a) namely, that it was competent to plead a right to an incorporeal hereditament by deed, and excuse proferat of the deed by alleging it to have been lost by time and accident. It became, therefore, a usual mode of claiming title to an incorporeal hereditament, to allege a feigned grant within the time of legal memory, from some owner of the land or other person capable of making such grant, to some tenant or person capable of receiving it, (b) setting forth the names of the supposed parties to the document, (c) with the excuse for proferat that the document had been lost by time and accident. On a traverse of

(y) 3 Stark. Ev. 911, 3rd Ed.; 1 Greenl. Ev. § 17, 7th Ed.; 2 Wms. Saund. 175a, 6th Ed.; *Bealey v. Shaw*, 6 East, 208; *Balston v. Bensted*, 1 Camp. 463; *Wright v. Howard*, 1 S. & Stu. 203; *Campbell v. Wilson*, 3 East, 294; *Lord Guernsey v. Rodbridges*, 1 Gilb. Eq. R. 4; *Bright v.*

*Walker*, 1 C. M. & R. 217.

(z) 3 Stark. Ev. 911, 3rd Ed.; 2 Wms. Saund. 175 *et seq.*, 6th Ed., and the cases there cited.

(a) 3 T. R. 151.

(b) *Shelford's Real Property Acts*, 57, 7th Ed.

(c) *Hendy v. Stevenson*, 10 East, 55.

the grant, proof of uninterrupted enjoyment for twenty years was held cogent evidence of its existence; and this was termed making title by "non-existing grant."

378. Much confusion has arisen from the loose language to be found in some of the books, on the subject of this presumption. In *Holcroft v. Heel*, (*d*)—which was an action on the case for disturbance of a market,—it appeared that the grantee of a market under letters patent from the crown, had suffered another person to erect a market in his neighborhood, and to use it for the space of twenty-three years without interruption; and the Court of Common Pleas held, that such user operated as a bar to the plaintiff's right of action. (*e*) But in the case of *Darwin v. Upton*, (*f*) Lord Mansfield says, "The enjoyment of lights, with the defendant's acquiescence for twenty years, is such decisive presumption of a right by grant or otherwise, that unless contradicted or explained, the jury ought to believe it; but it is impossible that length of time can be said to be an absolute bar, like a statute of limitation; it is certainly a presumptive bar which ought to go to the jury." And Buller, J. adds, "If the judge meant it" (*i. e.*, twenty years' uninterrupted possession of windows) "was an absolute bar, he was certainly wrong; if only a presumptive bar, he was right." The judgment of Lord Mansfield in *The Mayor of Hull v. Horner*, (*g*) is to the same effect. Again, the presumption of right from twenty years' enjoyment of incorporeal hereditaments,

(*d*) 1 B. & P. 400.

(*e*) With reference to this decision, it has been said that the action on the case, being a possessory action, was probably considered by the court to be in the nature of an ejectment in

which adverse, uninterrupted possession by the defendant, for twenty years, is a bar. 2 Wms. Saund., 6th Ed., 175c.

(*f*) 2 Wms. Saund., 6th Ed. 175c.

(*g*) Cowp. 102.

is often spoken of as a "conclusive presumption;" (*h*) an expression almost as inaccurate as calling the evidence a "bar." If the presumption be "conclusive," it is a *presumptio juris et de jure*, and not to be rebutted by evidence; whereas, the clear meaning of the cases is, that the jury ought to make the presumption, and act definitely upon it, unless it is encountered by adverse proof. "The presumption of right in such cases," says Mr. Starkie, (*i*) "is not conclusive; in other words, it is not an inference of mere law, to be made by the courts; yet it is an inference which the courts advise jurists to make wherever the presumption stands unrebutted by contrary evidence." It remains to add, that the doctrine in question has only been fully established in modern times, and was not introduced without opposition. (*j*)

**379.** In order, however, to raise this presumption against the owner of the inheritance, the possession must be with his acquiescence; and such a possession with the acquiescence of a tenant for life, or other inferior interest in the land, although evidence against the owner of the particular estate, will not bind the fee. (*k*) But the acquiescence of the owner of the inheritance may either be proved directly, or inferred from circumstances. (*l*) *E. g.*, where, in order to prove that a way was public, evidence was given of

(*h*) 1 Greenl. Ev. § 17, 7th Ed.; per Lord Ellenborough, in *Balston v. Bensted*, 1 Camp. 463, 465; and *Bealey v. Shaw*, 6 East, 208, 215.

(*i*) 3 Stark. Ev. 911, 3rd Ed.

(*j*) "I will not contend," says Sir W. D. Evans, "that, after the decisions which have taken place, it may not be more convenient to the public, that the doctrine which has been extensively acted upon in the enjoyment

of real estates, should be adhered to than departed from, though of very modern origin. . . . But I shall ever retain the sentiment that the introduction of such a doctrine was a perversion of legal principles, and an unwarrantable assumption of authority" 2 Ev. Poth. 139.

(*k*) 2 Wms. Saund. 175, 6th Ed., and the cases there cited.

(*l*) *Gray v. Bond*, 2 B. & B. 667.

acts of user by the public for nearly seventy years; but during the whole of that period land had been on lease; and the jury were directed that they were at liberty, if they thought proper, to presume from these acts a dedication of the way to the public by the owner of the inheritance, at a time anterior to the land being leased; this was held to be a proper direction. (*m*) And where the time has once begun to run against the tenant of the fee, the interposition of a particular estate does not stop it. (*n*)

**380.** This presumption only obtains its practically conclusive character, when the evidence of enjoyment during the required period remains uncontradicted and unexplained. In the case of *Livett v. Wilson*, (*o*) where in answer to an action of trespass, the defendant pleaded a right of way by lost grant; at the trial, before Gaselee, J., it appeared that there was conflicting evidence as to the undisputed user of the way, and the alleged right had been pretty constantly contested; whereupon the judge told the jury, that if they thought the defendant had exercised the right of way uninterruptedly for more than twenty years, by virtue of a deed, and that that deed had been lost, they should find a verdict for the defendant; and this ruling was fully confirmed by the court in banc. But the fact of possession for a less period than twenty years, is still a circumstance from which, when coupled with other evidence, a jury may infer the existence of a grant. (*p*)

**381.** We have seen that by the common law, a title by prescription could not be made against the

(*m*) *Winterbottom v. Lord Derby*,  
L. Rep., 2 Ex. 316.

(*n*) *Cross v. Lewis*, 2 B. & C. 686.

(*o*) 3 Bing. 115. See also *Doe d.*  
*Fenwick v. Reed*, 5 B. & A. 232, and

*Dawson v. The Duke of Norfolk*, 1  
Price, 246.

(*p*) *Bealey v. Shaw*, 6 East, 215;

see per Tindal, C. J., in *Hall v. Swift*,  
4 Bing. N. C. 381, 383.

crown. (*g*) But this doctrine was not extended to the case of a supposed lost grant; although, in order to raise such a presumption against the crown, a longer time was required than against a private individual. (*r*) The same holds where it is sought to acquire a right in derogation of the rights of the public. (*s*)

382. By the general law and of common right, the pews in the body of a church belong to the parishioners at large, for their use and accommodation; but the distribution of seats among them rests with the ordinary, whose officers the churchwardens are; and whose duty it is to place the parishioners according to their rank and station, subject to the control of the ordinary. (*t*) But a right to a pew as appurtenant to an ancient messuage, may be claimed by prescription, which pre-supposes a faculty; (*u*) and it is only in this light, namely, as easements appurtenant to messuages, that the right to pews is considered in courts of common law. (*v*) That right is either possessory or absolute. The ecclesiastical courts will protect a party who has been for any length of time in possession of a pew or seat, against a mere disturber, so far at least as to put him on proof of a

(*g*) *Supra*, § 368.

(*r*) 1 Greenl. Ev. § 45, 7th Ed.; Tayl. Ev. § 114, 4th Ed. See *Bedle v. Beard*, 12 Co. 4, 5; *Mayor of Hull v. Horner*, Cowp. 102; *Gibson v. Clark*, 1 Jac. & W. 159; *Roe d. Johnson v. Ireland*, 11 East, 280; *Goodtitle d. Parker v. Baldwin*, Id. 488; *Jewison v. Dyson*, 9 M. & W. 540, *Brune v. Thompson*, 4 Q. B. 543.

(*s*) *Weld v. Hornby*, 7 East, 195; *Chad v. Tilsed*, 2 B. & B. 403; *Vooght v. Winch*, 2 B. & A. 662; *R. v. Montague*, 4 B. & C. 598.

(*t*) *Corven's Case*, 12 Co. 105-6; 3

Inst. 302; *Byerley v. Windus*, 5 B. & C. 1; *Pettman v. Bridger*, 1 Phillim. 323; *Fuller v. Lane*, 2 Add. 425; *Blake v. Usborne*, 3 Hagg. N. R. 733. See also *Mainwaring v. Giles*, 5 B. & A. 356; and *Bryan v. Whistler*, 8 B. & C. 288.

(*u*) *Parker v. Leach*, L. Rep., 1 P. C. 312, 327; *Pettman v. Bridger*, 1 Phillim. 324; *Walter v. Gunner*, 1 Hagg. C. R. 317; *Wyllie v. Mott*, 1 Hagg. N. R. 39.

(*v*) 3 Stark. Ev. tit. Pew. 861, 3rd Ed.

paramount title. (*w*) And where the right is claimed as appurtenant to a messuage within the parish, possession for a long series of years will give a title against a wrong-doer in a court of common law. (*x*) But where the origin of the pew is shown, or the presumption is rebutted by circumstances, the prescriptive claim is at an end. (*y*) In order, however, to raise the presumption of a right by prescription or faculty, as against the ordinary, much more is required: and with respect to the length of occupation necessary for this purpose, it is difficult to lay down any general rule. (*z*)

383. In this state of the law were passed the statutes 2 & 3 Will. 4, cc. 71 and 100. Notwithstanding all that had been done by facilitating the proof of prescriptive rights, and allowing the pleading of non-existing grants, cases still occurred in which the length of the time of prescription operated to the defeat of justice. On this subject the Real Property Commissioners expressed themselves as follows: (*a*) "In some cases the practical remedy fails, and the rule (of prescription) produces the most serious mischiefs. A right claimed by prescription is always disproved, by showing that it did not or could not exist at any one point of time since the commencement of legal memory, &c., &c. Amidst these difficulties, it has

(*w*) *Pettman v. Bridger*, 1 Phillim. 324; *Spry v. Flood*, 2 Curt. 356.

(*x*) *Darwin v. Upton*, 2 Wms. Saund. 175c, 6th Ed.; *Kenrick v. Taylor*, 1 Wils. 326; *Stocks v. Booth*, 1 T. R. 428; *Rogers v. Brooks*, Id. 431, n.; *Griffith v. Matthews*, 5 T. R. 296; *Jacob v. Dallow*, 2 L. Raym. 755.

(*y*) *Griffith v. Matthews*, 5 T. R.

296; *Morgan v. Curtis*, 3 Man. & Ry. 389.

(*z*) See *Ashly v. Freckleton*, 3 Lev. 73; *Kenrick v. Taylor*, 1 Wils. 326; *Griffith v. Matthews*, 5 T. R. 296; *Pettman v. Bridger*, 1 Phill. 325; *Walter v. Gunner*, 1 Hagg. C. R. 322; *Woolcombe v. Ouldrige*, 3 Add. 6; *Pepper v. Barnard*, 12 L. J., Q. B. 361.

(*a*) First Report of the Real Property Commissioners, 51.

been usual of late, for the purpose of supporting a right which has been long enjoyed, but which can be shown to have originated within time of legal memory, or to have been at one time extinguished by unity of possession, to resort to the clumsy fiction of a lost grant, which is pleaded to have been made by some person seized in fee of the servient, to another seized in fee of the dominant tenement. But besides the objection of its being well known to the counsel, judge, and jury, that the plea is unfounded in fact, the object is often frustrated by proof of the title of the two tenants having been such, that the fictitious grant could not have been made in the manner alleged in the plea. The contrivance, therefore, affords only a chance of protection, and may stimulate the adversary to an investigation, for an indirect and mischievous end, of ancient title deeds, which for every fair purpose have long ceased to be of any use." There was also this inconvenience, that the evidence necessary to support a claim by lost grant, would not support a claim by prescription; so that a plea of the former might miscarry from the evidence going too far. (b) Add to all which, it was well observed that the requiring juries to make artificial presumptions of this kind amounted, in many cases, to a heavy tax on their consciences, which it was highly expedient should be removed. (c) In a word, it became at length apparent that the evil could only be remedied by legislation, and the statutes in question were passed for that purpose.

384. The former of these statutes, the 2 & 3 Will 4, c. 71, intituled "An act for shortening the time of prescription in certain cases," after reciting that

(b) See per Littledale, J., in *Blewett v. Tregonning*, 3 A. & E. 583, 584.  
(c) 2 Stark. Evid. 911, n. (d), 3rd

Ed.; per Parke, B., in delivering the judgment of the court in *Bright v. Walker*, 1 C. M. & R. 217-218.

"the expression, 'time immemorial, or time whereof the memory of man runneth not to the contrary,' is now by the law of England, in many cases, considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed, is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice;" for remedy thereof proceeds to enact, in the first section, that, "No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our sovereign lord the king, his heirs or successors, or any land being parcel of the Duchy of Lancaster or Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto, without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as afore said for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

Sect. 2. "No claim which may be lawfully made



at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the king, his heirs, or successors, or being parcel of the Duchy of Lancaster, or the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before-mentioned shall have been actually enjoyed by any person claiming right thereto without interruption, for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before-mentioned, shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement, expressly given or made for that purpose by deed or writing."

Sect. 3. "When the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing."

Sect. 4. "Each of the respective periods of years hereinbefore mentioned, shall be deemed and taken to be the period next before some suit or action wherein

the claim or matter to which such period may relate shall have been or shall be brought into question, and no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in, for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made."

Sect. 5. "In all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and in all pleadings to actions of trespass, and in all other pleadings wherein, before the passing of this act, it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof, as of right, by the occupiers of the tenements in respect whereof the same is claimed, for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be especially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation."

Sect. 6. "In the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favor or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed, for any less period of time or number of years than for such period or number mentioned in this act, as may be applicable to the case and to the nature of the claim."

Sect. 7. "The time during which any person, otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible."

Sect. 8. "When any land or water upon, over, or from which any such way or other convenient water-course or use of water shall have been, or shall be enjoyed or derived, hath been, or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter, as herein last before-mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall, within three years next after the end or sooner determination of such term, be resisted by any person entitled to any reversion expectant on the determination thereof."

**385.** A large number of decisions on the construction of this important statute are to be found in

the books, the discussion of which would be altogether out of place here. There are, however, a few points which require notice. 1. The earlier sections of the statute, being in the affirmative, do not take away the common law; and consequently do not prevent a party pleading a prescriptive claim, or claim by lost grant, in the same manner as he might have done before the act passed. And it is common in practice for a party to state his claim differently in several counts or pleas, relying in some on the common law, and in others on the statute. (*b*) 2. The words in section 4,—“some suit or action wherein the claim or matter to which such period may relate, shall have been or shall be brought in question,”—mean generally, any such suit or action; and not, individually, each suit or action in which the question may from time to time arise. (*c*) 3. The word “presumption” in the sixth section is used in the sense of artificial presumption, or presumption which, without any other evidence, shifts the burden of proof; the meaning of the section being, that no inference shall be drawn from the unsupported fact of an enjoyment for less than the prescribed number of years. But it was not intended to divest enjoyment for a shorter period of its natural weight as evidence, so as to preclude a jury from taking it into consideration, with other circumstances, as evidence of a grant; which accordingly they may still find to have been made, if they are satisfied that it was made in point of fact. (*d*) 4. The statute does not apply to easements or profits à prendre in gross, *e.g.* to a claim of free fishery in the

(*b*) See *Blewett v. Tregonning*, 3 A. & E. 534; *Wilkinson v. Proud*, 11 M. & W. 33; *Lowe v. Carpenter*, 6 Exch. 825; *Warburton v. Parke*, 2 H. & N.

(*c*) *Cooper v. Hubbuck*, 12 C. B., N. S. 456, 467.

(*d*) See *Bright v. Walker*, 1 C. M. & R. 211.

waters of another. (*e*) Lastly, it will be observed, that while the second speaks of "any way or other easement, watercourse, or use of water," the eighth uses the words, "way or other convenient watercourse, or use of water;" and two suppositions have been advanced to explain this apparent inconsistency; one, that the word "convenient" has crept into this section by mistake, instead of "easement;" the other, that "convenient" is a mistake for "convenience," a word used in old books as synonymous with easement. (*f*)

386. We have seen that "tithes, rent, and services" are excepted out of the 2 & 3 Will. 4, c. 71, s. 1. The two latter are provided for by the Statute of Limitations, 3 & 4 Will. 4, c. 27; (*g*) the provisions of which are irrelevant to our present purpose; and the former by 2 & 3 Will. 4, c. 100, which, in its first section, enacts, "all prescriptions and claims of or for any *modus decimandi*, or of or to any exemption from or discharge of tithes, by composition real or otherwise, shall, in cases where the render of tithes in kind shall be hereafter demanded by our lord the king, his heirs or successors, or by any Duke of Cornwall, or by any lay person, not being a corporation sole, or by any body corporate of many, whether temporal or spiritual, be sustained and be deemed good and valid in law, upon evidence showing, in cases of claim of a *modus decimandi*, the payment or render of such *modus*, and, in cases of claim to exemption or discharge, showing the enjoyment of the land without payment or render of tithes, money, or other matter in lieu thereof, for the full period of thirty years next before the time of such de-

(*e*) *Shuttleworth v. Le Fleming*, 19 Ed. C. B., N. S. 687.

(*g*) Amended by the 37 & 38 Vict., c. 57.

(*f*) *Gale on Easements*, 169, 4th c. 57.

mand, unless in the case of claim of a *modus decimandi*, the actual payment or render of tithes in kind, or of money or other thing differing in amount, quality, or quantity from the *modus* claimed, or in case of claim to exemption or discharge, the render or payment of tithes, or of money or other matter in lieu thereof shall be shown to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of *modus* was made, or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of *modus* was made, or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible, upon evidence showing such payment or render of *modus* made or enjoyment had, as is hereinbefore mentioned, applicable to the nature of the claim, for and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto: Provided always, that if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to show such payment or render of *modus* made or enjoyment

had (as the case may be), not only during the whole of such time, but also during such further number of years, either before or after such time, or partly before and partly after, as shall with such time be sufficient to make up the full period of sixty years, and also for and during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice; unless it shall be proved that such payment or render of modus was made, or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing." By sect. 8, "In the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favor or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed, for any less period of time or number of years than for such period or number mentioned in this act, as may be applicable to the case and to the nature of the claim. (g) This enactment, like the former, has not taken away the common law. (h)

387. 2. We proceed, in the second place, to consider the presumptions made from user, in cases of incorporeal rights not coming within the statutes above referred to. Among the foremost of these may be ranked the presumption of the dedication of highways to the public. "A road," says Littledale, J., in *R. v. Metlor*, (i) "becomes public, by reason of a dedication of the right of passage to the public by the owner of

(g) There are several other provisions and exceptions in this statute which are not inserted, as the practical operation of presumptive evidence of exemption from tithe has been almost put an end to by the Tithe Commutation Act, 6 & 7 Will. 4, c.

71, and subsequent acts. The 2 & 3 Will. 4, c. 100, has been amended in some respects by 4 & 5 Will. 4, c. 83.

(h) *The Earl of Stamford v. Du-* bar, 13 M. & W. 822.

(i) 1 B. & Ad. 32, 37. And see *R. v. St. Benedict*, 4 B. & A. 447.

the soil, and of an acceptance of the right by the public." And such dedication may be either general or limited,—*e.g.*, the owner of the soil may dedicate a footway to the public, subject to his right of periodically ploughing it up. (*j*) The fact of dedication may either be proved directly, or inferred from circumstances, (*k*) especially from that of permissive user on the part of the public. If a man opens his land so that the public pass over it continually, the public, after a user of a very few years, will acquire a right of way, (*l*) unless some act be done by the owner, to show that he had only intended to give a license to pass over the land, and not to dedicate a right of way to the public. (*m*) Among acts of this kind may be reckoned the putting up a bar, or excluding by positive prohibition persons from passing. (*n*) The common course is by shutting up the passage for one day in each year. (*o*) Where no acts of this nature have been done, there is no fixed rule as to the length of user, which is sufficient when unaccompanied by other circumstances, to constitute presumptive evidence of a dedication; but unquestionably a much shorter time will suffice than is required to raise the presumption of a grant among private individuals. In the case of *The Rugby Charity v. Merryweather*, (*p*) Lord

(*j*) *Mercer v. Woodgate*, L. Rep., 5 Q. B. 26; *Arnold v. Blaker* (in Cam. Scac.) 6 Id. 433.

(*k*) *R. v. Wright*, 3 B. & Ad. 681; *Surrey Canal Company v. Hall*, 1 Man. & Gr. 392; *R. v. St. Benedict*, 4 B. & A. 447.

(*l*) *The British Museum v. Finnis*, 5 C. & P. 460; *Lade v. Shepherd*, 2 Str. 1004.

(*m*) *Barraclough v. Johnson*, 8 Ad. & E. 99.

(*n*) *R. v. Lloyd*, 1 Camp. 260; *Rob-*

*erts v. Karr*, Id. 262, n.; *Lethbridge v. Winter*, Id. 263, n.

(*o*) Per Patteson, J., in *The British Museum v. Finnis*, 5 C. & P. 460, 465. But the keeping a gate across a road is not conclusive evidence against its being a public way, for it may have been granted with the reservation of keeping a gate in order to prevent cattle straying. *Davies v. Stephens* 7 C. & P. 570.

(*p*) 11 East, 376, n.



Kenyon says, that "in a great case, which was much contested, six years was held sufficient:" and where the existence of a highway would be beneficial to the owner of the soil, a dedication has been presumed from a user of four or five years. (*q*) But the animus or intention of the owner of the soil in doing the act, or premitting the passage, must be taken into consideration. (*r*) "In order," says Parke, B., in *Poole v. Huskinson*, (*s*) "to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an animus dedicandi, of which the user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment." And this animus or intention is to be determined by jury. (*t*) But the dedication of a highway to the public must be the act, or at least with the consent, of the owner of the fee; the act or assent of a tenant for any less interest will not suffice; (*u*) although the assent of the owner of the inheritance may be inferred from circumstances. (*v*) Upon the whole, the public are favored in questions of this nature; (*x*) and it seems, that when a road has once been a king's highway, no lapse of time or cessation of user will deprive the public of the right of passage when-

(*q*) *Jarvis v. Dean*, 3 Bing. 447.

(*r*) *Poole v. Huskinson*, 11 M. & W. 827; *R. v. The Inhabitants of East Mark*, 11 Q. B. 877.

(*s*) 11 M. & W. 827, 830.

(*t*) *Barraclough v. Johnson*, 8 A. & E. 99; *Surrey Canal Company v. Hall*, 1 Man. & G. 392.

(*u*) *Baxter v. Taylor*, 1 Nev. & M. 11; *R. v. Bliss*, 7 A. & E. 550; *Wood*

*v. Veal*, 5 B. & A. 454.

(*v*) *Winterbottom v. Lord Derby*, L. Rep., 2 Ex. 316; *Davies v. Stephens*, 7 Car. & P. 570; *R. v. Barr*, 4 Camp. 16; *Jarvis v. Dean*, 3 Bing. 447; *R. v. Hudson*, 2 Str. 909; *Harper v. Charlesworth*, 4 B. & C. 574.

(*x*) *R. v. The Inhabitants of East Mark*, 11 Q. B. 877; *R. v. Petrie*, 4 E. & B. 373.

ever they please to resume it. (*y*) The presumption in question can, it is said, be made against the Crown. (*z*)

388. The next subject calling for attention here, is the presumption of the surrender or extinguishment of incorporeal rights by non-user. This is altogether unaffected by the prescription acts, (*a*) and the general principle is thus stated by Abbott, C. J., in *Doe d. Putland v. Hilder*: (*b*) "The long enjoyment of a right of way by A. to his house or close, over the land of B., which is a prejudice to the land, may most reasonably be accounted for, by supposing a grant of such right by the owner of the land: and if such a right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may most reasonably be accounted for, by supposing a release of the right. In the first class of cases, therefore, a grant of the right, and in the latter, a release of it, is presumed." But the result of the cases on this subject would seem to be, that the non-user of a privilege or easement, is merely evidence of abandonment; and that the question of abandonment is one of fact, which must be determined on the whole of the circumstances of each particular case. (*c*)

389. With respect to the presumed extinguishment of "Easements" from cessation of enjoyment, the following principles are laid down in a text work: (*d*) "Though the law regards with less favor the ac-

(*y*) 2 Selw. N. P. 1362, 9th Ed; *Dawes v. Hawkins*, 8 C. B., N. S. 848, 858.

(*z*) *R. v. The Inhabitants of East Mark*, 11 Q. B. 877. See *ante*, §§ 368, 381.

(*a*) Gale on Easements, 529, 4th Ed.

(*b*) 2 B. & A. 782, 791.

(*c*) See per Wood, V. C., *Crossley v. Lightowler*, L. Rep., 3 Eq. 279, 292; *Eldridge v. Knott*, Cowp. 214; *Simpson v. Gutteridge*, 1 Madd. 609.

(*d*) Gale on Easements, 528, 4th Ed.

takes in a horse to be stabled and fed for hire, upon the understanding that the horse is to be re-delivered to the owner whenever he requires it, the livery-stable keeper has no right of lien upon the horse for his keep, (*x*) or for money paid by him to a veterinary surgeon for blistering the horse according to the owner's directions, (*y*) the right of the owner to the possession of the horse for the purpose of riding him being deemed inconsistent with the right of lien. The livery-stable keeper, indeed, who holds a horse at the constant disposal of the owner, is the mere servant of the latter, and has nothing more than the bare custody of the animal. This is the case also with the agister of milch cows, who receives them to be depastured, agisted, or fed, the owner having a right to the possession of the cows whenever he requires them for the purpose of milking. (*z*) And if a trainer of race-horses holds them on the understanding that the owner may send them to be ridden by a jockey of his own choice at any race he chooses, and the trainer can not lawfully refuse to deliver them to the owner for such a purpose, that state of things is inconsistent with the existence of a right of lien. (*a*) If a policy of insurance is deposited for safe custody only, the depositary can not set up a lien upon it for an antecedent debt. (*b*) If a person receives a bill of exchange to get it discounted, and pay over the proceeds to the owner, or apply them in some specified manner, he has no lien upon the bill for money that may be due from the latter. (*c*) If a ship-factor receives the certificate of registry of a ship in order to pay the tonnage dues, he has no lien upon it for a debt due to him from the shipowner. (*d*) When-

(*x*) Judson v. Etheridge, 1 C. & M. 743. Yorke v. Grenaugh, 2 Ld. Raym. 868.

(*y*) Orchard v. Rackstraw, 19 Law J., C. P. 303.

(*z*) Jackson v. Cummins, 5 M. & W. 342. Chapman v. Allen, Cro. Car. 273.

(*a*) Forth v. Simpson, 13 Q. B. 685.

(*b*) Muir v. Fleming, D. & R., N. P. C. 30.

(*c*) Key v. Flint, 8 Taunt. 23; 1 Moore. 451. Buchanan v. Findlay, 9 B. & C. 749.

(*d*) Burn v. Brown, 2 Stark. 273.

Barb. (N. Y.) 41; Grinnell v. Cook, 3 Hill (N. Y.) 485; Neff v. Thompson, 8 Barb. (N. Y.) 213; Bissell v. Case, 28 N. Y. 252.

Where there is a special agreement inconsistent therewith, a lien never attaches; Trust v. Pierson, 1 Hilt. (N. Y.) 292; Bailey v. Adams, 14 Wend. (N. Y.) 201; Fielding v. Mills, 2 Bos. (N. Y.) 489; unless the agreement is broken by the bailor in which case, if there is a lien at common law, he may assert it; Mount v. Williams, 11 Wend. (N. Y.) 77.

ever goods in the hands of a bailee or depositary are, by the terms of the contract, to be re-delivered to the owner at some stated period, or "if by the agreement the plaintiff is to have the goods immediately, and the payment in respect of them is to take place at a future day, the bailee can not set up any lien." (e) A lien is wholly inconsistent with a dealing on credit, and can only exist where payment is to be made in ready money, or security is to be given the moment the work is completed. (f) "If security" (such as a bill, note, or bond) "is taken for the debt for which the party has a lien upon the property of the debtor, such security being payable at a distant day, the lien is gone." (g)

If a person, when goods are demanded of him, rests his refusal to deliver them up on grounds quite distinct from any claim of lien, he can not afterwards, on finding that those grounds fail him, put forward a claim of lien as a justification for his refusal. Where, therefore, a warehouseman, on being applied to for brandy which had been delivered to him for safe custody, refused to give it up, saying that it was his own property, it was held that he could not afterwards justify his refusal on the ground that warehouse rent was due to him, and was not tendered at the time the brandy was demanded, (h) "for it would be absurd to offer the expenses of keeping the goods to one who insisted on retaining them as his own property." (i) But a person does not, of course, lose his right of lien by merely omitting to mention it when the goods are demanded. And if he claims a right to retain them for two separate charges, and has a lien only in respect of one of them, this will not dispense with the necessity of a tender of the one in respect of which the lien exists. (k)<sup>1</sup>

(e) *Crawshay v. Homfrey*, 3 B. & Ald. Ves. 280. *Horncastle v. Farran*, 3 B. & Ald. 497.

(f) *Raitt v. Mitchell*, 4 Campb. 146.

(g) *Hewison v. Guthrie*, 3 Sc. 298; 2 B. N. C. 759. *Cowell v. Simpson*, 16

(h) *Boardman v. Sill*, 1 Campb. 410,

n. *Weeks v. Goode*, *ante*.

(i) *White v. Gainer*, 9 Moore, 45.

(k) *Scarfe v. Morgan*, 4 M. & W. 281.

<sup>1</sup> *Hanna v. Phelps*, Ind. 21.

If a person when goods are demanded of him claims to hold them for any other purpose than that of satisfying his lien, or if he does not assert his lien, he is treated as having waived it. *Rogers v. Wier*, 34 N. H. 463; *Holbrook v. Wight*, 24 Wend. (N. Y.) 169; *Dunlap v. Hunting*, 2 Den. (N. Y.) 643; *Picquet v. McKay*, 2 Blackf. (Ind.) 465; *Everett v. Coffin*, 6 Wend. (N. Y.) 603; *LaMotte v. Archer* 4 E. D. S. (N. Y.) 46.

**613. Parties against whom a lien may be claimed.**—A mere trespasser or wrong-doer, who gets possession of property without the consent of the owner, can not in general deal with it so as to create a right of lien thereon as against the true owner, (*l*) unless the person in whose possession the property is placed is a public inn-keeper, or common carrier, or common ferryman, or is bound to exercise his craft in favor of all who require his services. (*Post*, ch. 10.) Where the owner of a pony phaeton intrusted the phaeton to a painter to be painted, and the latter carried it to the premises of the defendant, who was in the habit of taking carriages to stand on his premises for hire, and there left it, and, the phaeton never having been painted or brought back, the plaintiff, after the expiration of three months, made search for it, and found it on the premises of the defendant, who claimed a lien on it for the price of the standing-room, it was held that the defendant had no such lien. (*m*) And where a chaise, which had been broken by the negligence of a servant, was taken by the latter to a coach-maker's, without the knowledge or sanction of the master, and was there repaired, it was held that the coach-maker had no lien upon the chaise as against the master for the price of the repairs. (*n*) It would seem also, from the adjudged cases, that if a servant is directed to take a carriage to A to be repaired, and he by mistake takes it to B, B would have no lien upon it for the price of the repairs, as the servant was not authorized to employ B in the matter. This may be law, but it is hardly just, and opens a wide door to fraud, as it is impossible for the coach-maker to be cognizant of the particular directions given by the master to the servant. If the servant has received general directions to get the carriage repaired, he may then of course give a right of lien to any coach-maker he may employ to do the repairs. (*o*) It has been held that if a person obtains possession of goods by fraud, and pawns them, the pawnee is entitled to a lien upon them for the money advanced as against the true owner. (*p*) But the possession of goods by the

(*l*) *Hartop v. Hoare*, 3 Atk. 44. *Lempriere v. Pasley*, 2 T. R. 485. *Castellain v. Thompson*, 13 C. B., N. S. 105.

(*m*) *Buxton v. Baughan*, 6 C. & P. 674.

(*n*) *Hiscox v. Greenwood*, 4 Esp. 174.

(*o*) *Weldon v. Gould*, 3 Esp. 268.

(*p*) *Parker v. Patrick*, 5 T. R. 175; doubted in *Peer v. Humphrey*, 2 Add. & E. 499; said to be good law by *Parke, B.*, in *Load v. Green*, 15 M. & W. 219; and *Cresswell, J.*, in *White v. Garden*, 20 Law J., C. P. 168.

pawnor must have been obtained by virtue of a contract intended to pass the property to him. If a person pawns with another property to which he has no color of title, the *jus tertii* may always be set up against the pawnor by the pawnee. (q)

614. *General lien* is a right on the part of a manufacturer, or workman, factor, broker, or commission agent for the sale of goods, warehouseman or wharfinger, into whose hands goods have been placed to be worked up, repaired, improved, sold, or taken care of for hire, in the ordinary course of their trade or employment, to retain possession of them, not only until they have received payment of the hire due to them for their services in the particular employment, but for the general balance due to them from their employer in the ordinary course of dealing for work and services of the like nature bestowed at other times upon other goods of the employer. This right depends either upon the express agreement of the parties, or the custom and usage of the particular trade or business. The onus of making out and establishing the right, whether it exists by agreement or by custom, lies upon the person claiming it. When custom and usage of trade are relied upon as establishing the right, the usage must be shown to have governed the parties in their previous dealings together, or to prevail to such an extent that the contracting party must be supposed to be cognizant of it, and to have contracted subject to the usage; but, as the right is an encroachment upon the ordinary rules and principles of the common law, it is regarded with jealousy by the courts, and requires the strongest proof.

Where persons carry on a trade or business in which a general lien is recognized, they can not claim a general lien in respect of goods or securities which are, by agreement, held for a particular purpose, or under special conditions inconsistent with the claim of a general lien. (r) A general lien can not be set up in opposition to the terms and conditions upon

(q) *Cheeseman v. Exall*, 6 Exch. 345. *seq.*  
 As to pledges by factors and agents, see (r) *Bock v. Gorrissen*, 2 De G. F. & J. 434; 30 Law J., Ch. 42.  
*Addison on Contracts*, 6th ed., p. 281, *et*

<sup>1</sup> *Jarvis v. Rogers*, 15 Mass. 389; *Allen v. Ogden*, 1 Wash. (U. S.) 174; *Mount v. Williams*, 11 Wend. (N. Y.) 77; *Picquet v. McKay*, 2 Blackf. (Ind.) 465; *Roberts v. Kain*, 6 Rob. (N. Y.) 654.

which the goods were received. Thus, if a broker or factor receives goods to sell, and applies the proceeds in some particular manner, he can not set up a lien for his general balance, because a lien of this nature would be utterly inconsistent with the terms upon which he acquired possession of the goods. (s) And if a debtor deposits a bill of exchange with his creditor, in order that the latter may get the bill discounted and pay over the proceeds to the debtor, the creditor can not set up a lien upon the bill for the general balance due to him. (t) In some places, dyers, calico-printers, fullers, warehousemen, wharfingers, and packers, have been held, in accordance with the proved usage of their several trades in the particular locality, to have a lien on goods sent to them to be dyed, printed, warehoused, worked upon, or taken care of, not only for the work done upon, or in respect of, the particular goods in their possession, but also for their charges of dying, printing, warehousing, &c., other goods which had previously been delivered back to their owners; (u) and in other places, where no such usage has been shown to exist, they have been held to have no such general lien. (x) The usage, when it exists, must be shown to be long established, and notorious, fair, and reasonable, and not contrary to any established principle of law. (y) It has been held that a purchaser has a lien upon any one or more parts or numbers of a work, for his charges and disbursements for printing or publishing the various numbers, though not consecutive, of an entire work; (z) also, that an agent who carries on business in his own name, on behalf of an undisclosed principal, has a lien on the business, the stock employed in it, and the debts owing to it, to the extent of the liability which he has incurred in the conduct and management of the business. (a)

**615. *Lien of factors and brokers.***—Factors and brokers to whom goods are consigned to be sold, have a lien for the general balance due to them from their employers or principals

(s) Walker v. Birch, 6 T. R. 262.

(t) Key v. Flint, 1 Moore, 451; 8 Taunt. 21.

(u) Savill v. Barchard, 4 Esp. 52. Naylor v. Mangles, 1 Ib. 109. Spears v. Hartley, 3 Ib. 81. Rose v. Hart, 8 Taunt. 499; 2 Moore, 547. Webb v. Fox, 2 Peake, N. P. C. 167.

(x) Green v. Farmer, 4 Burr. 2214; 1 W. Bl. 651. Holderness v. Collinson, 7 B. & C. 216.

(y) Rushforth v. Hadfield, 6 East, 528. Leuckhart v. Cooper, 3 Sc. 521; 3 B. N. C. 99.

(z) Blake v. Nicholson, 3 M. & S. 167.

(a) Foxcraft v. Wood, 4 Russ. 488

in the ordinary course of their business as factors, and for their acceptances on behalf of such employers, upon the goods whilst they are in their possession, and on the moneys realized by the sale of them. (*b*) This right exists universally by the custom of the trade. It is part of the law merchant, and as such is judicially taken notice of by the courts, no proof being ever required as a matter of fact that such general lien exists; but no such lien can be claimed as resulting from any general law of principal and agent. (*c*) The lien does not extend to a collateral debt not growing out of the relationship of principal and factor, such as a debt due for rent, (*d*) nor to goods which have not actually reached the hands of the factor, (*e*) or which have come into his possession without the consent and direction of the owner; consequently, if goods have been left at the factor's place of business by mistake or inadvertence, (*f*) or have been taken possession of by him without the authority of the owner, he can not set up a lien upon them for his balance. (*g*) And if the person from whom he receives the goods is only an agent, he can not retain them as against the true owner for a debt that was due to him from the agent at the time the goods were put into his hands, and which was not contracted on the credit of the deposit of the goods; but it is otherwise if he has made advances on the credit of the deposit, not knowing the depositor to be an agent. (*h*) The factor can only claim a lien for his general balance upon goods which come to his hands as factor. A factor, therefore, who effects a policy of insurance, not as factor, but as an insurance broker, is not entitled to a general lien on a policy in his hands for a balance due to him in his character of factor. (*i*)

616. *Insurance brokers* have also, by the general usage and custom of trade, a lien upon every policy effected by them for the premium paid on such policy, and for their commission, and also for the general balance due to them from their employers upon all policies effected by them for such employers,

(*b*) *Kruger v. Wilcox*, Ambl. 252.

*Hudson v. Granger*, 5 B. & Ald. 31.

*Hammond v. Barclay*, 2 East, 227.

(*c*) *Bock v. Gorissen*, 30 Law J., Ch. 42.

(*d*) *Houghton v. Matthews*, 3 B. & P.

485.

(*e*) *Kinloch v. Craig*, 3 T. R. 123

(*f*) *Lucas v. Dorrien*, 7 Taunt. 279.

(*g*) *Taylor v. Robinson*, 2 Moore, 730.

(*h*) *Pultney v. Keymer*, 3 Esp. 181.

*Addison on Contracts*, 6th ed., pp. 279-283. *Freeman v. Appleyard*, 32 Law J. Exch. 175.

(*i*) *Dixon v. Stansfeld*, 10 C. B. 398.



and left in their hands, and upon all moneys received by them upon such policies from the underwriters, unless the person for whom they effected the policy was himself only an agent in the matter; in which case the extent of their lien will depend upon the disclosure or concealment of the agency, and the degree of credit they may have given to the agent, under the impression that he was the person really interested in the policy. The lien does not extend to a collateral debt not incurred in respect of brokerage business. (*k*)

617. *Lien of bankers.*—Bankers also, who are a species of factors in pecuniary transactions, have, by the general law of the land, a lien upon all the securities for money of their customers in their hands for their advances to such customers in the ordinary course of business, (*l*) unless such securities have been received under special circumstances, and not in the ordinary way of their business as bankers, or under some special arrangement or understanding inconsistent with the exercise of the right, or limiting it to some specified amount. (*m*) By the term securities is meant notes, bills and negotiable instruments, coupons, bonds of foreign governments, &c. (*n*) If title-deeds and securities for money, not being negotiable, are deposited in the hands of a banker by a person who is wrongfully possessed of them, or is not the true owner thereof and is not authorized to raise money upon them, the banker has no better or further rights over them than the person who deposited them in his hands, and can not set up a lien upon them as against the true owner. (*o*) But as regards negotiable securities, such as exchequer bills, bills of exchange, and promissory notes, the right of general lien will extend to them, although the customer who delivered them to the banker was not the owner, but was holding them as an agent or trustee of some third person, unless the banker knew at the time he received the securities that they did not belong to the person

(*k*) *Mann v. Forrester*, 4 Campb, 60. *Mann v. Shiffner*, 2 East, 259.

(*l*) *Davis v. Bowsher*, 5 T. R. 488. The articles of association of joint-stock banks not unfrequently provide that the bank shall have a lien on the shares of a shareholder for all money due to the bank by such shareholder. See *Re Gen-*

*eral Exchange Bank*, L. R., 6 Ch. App 818.

(*m*) *Vanderzee v. Willis*, 3 Bro. C. C. 21.

(*n*) *Brandao v. Barnett*, 12 Cl. & F. 787. *Wylde v. Radford*, 33 Law J., Ch. 53.

(*o*) *Lucas v. Dorrien*, 7 Taun. 278. *Newton v. Newton*, L. R., 6 Eq. Ca. 135

from whom he received them. The lien of a banker upon the securities in his hands belonging to his customers is part of the law merchant, and as such is judicially taken notice of by the courts. (*p*)

**618. *Lien of attorneys and solicitors.***—Attorneys and solicitors also have a lien upon all money recovered by them in the actions and suits in which they are employed (matrimonial, in bankruptcy, or otherwise), (*q*) and upon all the deeds and papers and other articles of their clients which come to their hands in their professional capacity, for the purposes of business, for the costs not only of the particular cause or matter with which such deeds or papers are connected, but for the costs due to them generally from their clients. (*r*) But a solicitor has no lien upon the will of a client for the costs incurred in the preparation of it, and can not therefore refuse to produce it after his client's death until his costs have been paid. And where deeds are delivered for a specific purpose, the right of lien is extinguished as soon as the particular purpose has been accomplished, and it may be superseded altogether by the attorney's taking from the client security for his costs. (*s*) The town agent of a country attorney has a lien only upon the money recovered, and upon the papers in his hands in the particular cause in which he is engaged, for the amount due to him by the attorney in that particular cause. He can not set a claim of lien for the general balance due to him from the country attorney who employs him, and can not retain the money or papers of the client to satisfy his general debt. (*t*) And his lien is limited to the debt actually due from the client

(*p*) *Barnett v. Brandao*, 7 Sc. N. R. 331. *Wookey v. Pole*, 4 B. & Ald. 11. *Collins v. Martin*, 1 B. & P. 648.

(*q*) *Ex parte Bremner*, L. R., 1 Prob. & Div. 254. *Ex parte Cleland*, L. R., 2 Ch. App. 811. *The Jeff Davis*, L. R., 1 Adm. & Eccl. 1. *The Leader*, 2 Ibid. 314. *Mercer v. Graves*, L. R., 7 Q. B. 499. As to his lien as against an official liquidator, see *Re Union Cement & Brick Co.*, L. R., 4 Ch. App. 627. *Re South Essex Reclamation Co.*, 38 L. J., Ch. 305.

(*r*) *Stevenson v. Blakelocke*, 1 M. & S. 535. *Lambert v. Buckmaster*, 2 B. & C. 616. *Blunden v. Desert*, 2 Dru. & W. 405. *Friswell v. King*, 15 Sim. 191.

*Robbins v. Goldingham*, L. R., 13 Eq. Ca. 440. As to an attorney's lien on a judgment for his costs, see *O'Brien v. Lewis*, 32 Law J., Ch. 665. *Slater v. Sunderland* (Mayor of), 33 Law J., Q. B. 37. *Langley v. Headland*, 34 Law J., C. P. 183. *Re Bank of Hindustan*, L. R., 3 Ch. App. 125. *Ex parte Morrison*, L. R., 4 Q. B. 153. As to a proctor's, *Patterson v. Patterson*, L. R., 2 Prob. & Div. 192.

(*s*) *Genges v. Genges*, 18 Ves. 294. *Balch v. Symes*, Turn. & R. 92.

(*t*) *White v. Royal Exchange Ass. Co.*, 7 Moore, 249. *Moody v. Spencer*, 2 D. & R. 6; *Anon.*, 2 Dick. 802.

to the country solicitor, so that if the country client pays the country solicitor the lien is discharged, for the country solicitor can give the town agent no lien which he does not himself possess. (*u*)

An attorney can not set up a general lien for the balance due to him in respect of services not rendered by him as an attorney, nor can he detain deeds and papers which do not come to him in his professional character. He has no lien, for example, where he acts or holds papers as town-clerk, (*x*) or steward of a manor; (*y*) he can not set up any lien which is inconsistent with the nature of his employment, or the terms, or conditions, or express or implied trust upon which he received the papers. (*z*) His right, moreover, is dependent upon the rights of his client, and he can not acquire more extensive powers over the papers in his hands than the client himself possessed at the time he deposited them with him. (*a*) If an attorney transacts business for a firm in partnership collectively, and also manages the private business of the members of the firm individually, he has no lien upon the private securities, deeds and writings, of one partner in respect of the business done for the firm. (*b*)<sup>1</sup>

(*u*) *Waller v. Holmes*, 1 Johns. & Hem. 239; 30 Law J., Ch. 24. *Re Andrew*, 7 H. & N. 87; 30 Law J., Exch. 403. *Peatfield v. Barlow*, 38 L. J., Ch. 311.

(*x*) *Champernown v. Scott*, 6 Mad. 93.

(*y*) *Rex v. Sankey*, 5 Ad. & E. 428.

(*z*) *Lawson v. Dickenson*, 8 Mod. 307. See *Re Faithful*, L. R., 6 Eq. Ca. 324.

*Simmonds v. Gt. East. Rail. Co.*, L. R., 3 Ch. App. 797.

(*a*) *Hollis v. Claridge*, 4 Taunt. 807.

*Esdaile v. Oxenham*, 3 B. & C. 229.

*Lightfoot v. Keane*, 1 M. & W. 745.

*Molesworth v. Robbins*, 2 Jon. & L. 358.

(*b*) *Turner v. Deane*, 3 Exch. 836; 18 Law J., Exch. 343. See *Re Moss*, L. R., 2 Eq. Ca. 345.

<sup>1</sup> An attorney has a lien upon all papers in a cause prepared by him or in his possession to be used in the cause, as well as upon all judgments or recoveries obtained by him or through his services for the fees or compensation due him from the judgment creditor, and the courts will protect and enforce this lien. But the lien does not attach upon moneys involved in the suit or suits, until judgment, and prior to that time the parties may settle the suit without the assent of the attorney, or without any reference to his fees or charges. *Hutchinson v. Pettis*, 18 Vt. 614; *Foot v. Tewksbury*, 2 Vt. 9; *Potter v. Mago*, 3 Me. 34; *Ten Broeck v. Dewitt*, 10 Wend. (N. Y.) 617; *Getchell v. Clark*, 5 Mass. 309; *Carter v. Davis*, 8 Fla. 183; *Power v. Kent*, 1 Cow. (N. Y.) 172; *Walker v. Sargeant*, 14 Vt. 247; *Heister v. Derr*, 17 N. J. 438; *Gray v. Lawson*, 36 Ga. 629; *Hunchey v. Chicago*, 41 Ill. 136; *Caser v. Sargeant*, 7 Iowa, 317; *McDowell v. Second Av. R. R. Co.*, 4 Bos. (N. Y.) 670.

In N. Y. under the code the lien attaches so as to prevent a settlement of the parties. *Winans v. Mason*, 33 Barb. (N. Y.) 532; *Hall v. Ayer*, 9 Abb. Pr. (N. Y.)

By the 23 & 24 Vict. c. 127, s. 28, it is provided, that in any case before a court of justice where an attorney shall be employed to prosecute or defend, the court or judge may declare the attorney entitled to a charge upon the property recovered or preserved through his instrumentality, (c) and may make an order for the taxation of the attorney's costs, and for the payment of them out of such property; and all convey-

(c) See *Twyman v. Porter*, L. R., 11 Eq. Ca. 181. *Heinrich v. Sutton*, L. R., 6 Ch. App. 865. *Re National Assurance & Instrument Co.*, L. R., 7 Ch. App. 221. *Baile v. Baile*, L. R., 13 Eq. Ca. 497. *The Henrich*, L. R., 3 Adm. & Eccl. 505.

220; *Wood v. Trustees*, 7 Id. 210. But his lien upon the papers attaches before judgment, and he can not be compelled to give them up until his lien is discharged. *Hutchinson v. Howard*, 15 Vt. 544; *Dennett v. Cutts*, 11 N. H. 163; *Howard v. Oscola*, 22 Wis. 453; *St. John v. Deifendorf*, 12 Wend. (N. Y.) 261. And the lien attaches at the commencement of the action. *Keenan v. Dorflinger*, 19 How. Pr. (N. Y.) 153; *Shackleton v. Hart*, 20 How. Pr. (N. Y.) 89. But not if he voluntarily withdraws from the suit. *White v. Harlow*, 5 Gray (Mass.) 463.

In Pennsylvania an attorney has no lien upon papers or the judgment, but if money belonging to his client comes into his hands, may deduct his bill. *Dubois' Appeal*, 38 Penn. St. 231; *Walton v. Dickerson*, 7 Id. 376. Nor does it extend to anything beyond the statutory costs and disbursements in that particular suit. It does not embrace or extend to all charges made by him in the prosecution of the business. *Cozzens v. Whitney*, 3 R. I. 79; *Mansfield v. Dorlan*, 2 Cal. 507; *Heartt v. Chipman*, 2 Aik. (Vt.) 162; *Wells v. Hatch*, 43 N. H. 246; *Phillips v. Stagg*, 2 Edw. (N. Y.) 108; *Wright v. Cobleigh*, 21 N. H. 339; *Watts v. Grace*, 21 Ark. 118; *Adams v. Fox*, 40 Barb. (N. Y.) 442.

But in New York under the Code it extends to all charges in the action. *Fox v. Fox*, 24 How. Pr. (N. Y.) 463; *Rooney v. Second Av. R. R. Co.*, 18 N. Y. 368.

An attorney's lien has preference over a set-off of cross judgments; *Holt v. Quimby*, 6 N. H. 79; *Peckham v. Barcalow*, H. & D's. Supp. (N. Y.) 112; but see contra, *Currier v. R. R. Co.*, 37 N. H. 223; or over a set-off accruing after the bringing of the action, or against a payment of the judgment even when the judgment debtor had reasonable notice of the attorney's lien; *Warfield v. Campbell*, 38 Ala. 527; *Stephens v. Farror*, 4 Bush. (Ky.) 13; *Andrews v. Morse*, 12 Conn. 144; *Rider v. Ocean Ins. Co.*, 20 Pick. (Mass.) 259; *Bradt v. Coon*, 4 Cow. (N. Y.) 416; *Shapley v. Bellows*, 4 N. H. 347; but where there is no notice of an attorney's lien a judgment may be paid to the creditor; *Dodd v. Bratt*, 1 Minn. 270; *Forbush v. Leonard*, 8 Minn. 303; *Bumrill v. Huntington*, 5 Day (Conn.) 163; *Hurt v. Sheets*, 21 Iowa, 501; *Stone v. Hyde*, 22 Me. 318; *Talcott v. Bronson*, 4 Paige (N. Y.) 501; but where the judgment is for costs alone, this is treated as notice to everybody that the attorney has a lien thereon. *Wood v. Wardsworth*, 1 E. D. S. (N. Y.) 598; *McGregor v. Comstock*, 28 N. Y. 237.

It is not essential that the costs should be liquidated; *Ward v. Wardsworth, ante*; and a payment by a third person does not defeat the lien; *Fox v. Fox, ante*, or prevent the enforcement of it by issue of execution against the debtor under an order of court. *Shackleton v. Hart*, 14 Abb. Pr. (N. Y.) 229; *Wood v. Trustees*, 7 Id. 210.

ances and acts done to defeat such charge, except to a bona fide purchaser for value, without notice, shall be void. (d) The attorney's charge for his costs under this section only extends to the property of his own client, and not to that of other persons. (e) But, independently of any order under the above statute, the proctor's lien in the Admiralty Court will attach and take precedence of the claim of a garnishee. (f)

619. *Certificated conveyancers* have no lien upon the papers and instructions placed in their hands for the purpose of enabling them to draw a conveyance. (g)

620. *Lien of shipmasters*.—An agent can not acquire a lien upon the property of his principal for work done by others whom he has employed and paid. A shipmaster, therefore, has no lien upon a ship for money expended or debts incurred by him for repairs done to her on the voyage. (h)

621. *Lien for freight*.—The lien of shipowners and masters of ships on goods and cargoes for freight is regulated by the Merchant Shipping Act. (i)

622. *Lien of consignees*.—The general lien of a consignee upon goods consigned to him can not be set up against positive directions given him by the consignor, and if he accepts a consignment accompanied by directions to apply the proceeds of it in a particular way, he is bound by such directions. (j)

623. *Notice that goods will be held subject to a general lien*.—The right to retain for a general balance may, with certain exceptions presently noticed, be created by the express contract of the parties. Every workman and artificer not being a public inn-keeper, common carrier, or common ferryman, and not being bound to exercise his calling in favor of all persons who may require his services, has a right to prescribe the terms upon which he will receive goods into his possession to be dealt with in the ordinary course of his trade, and may by express notice reserve to himself a general lien, if he thinks fit so to do. Thus, where the dyers, dressers, bleachers, whisters,

(d) See *The Philippine*, L. R., 1 Adm. & Eccl., 309. *Re Massey*, L. R. 9 Eq. Ca. 367. *Re Keane*, L. R., 12 Eq. Ca. 115.

(e) *Berrie v. Howitt*, L. R., 9 Eq. Ca. 1.

(f) *The Jeff Davis*, L. R., 2 Adm. & Eccl. 1. See *The Henrich*, *ante*.

(g) *Stedman v. Hockley*, 15 M. & W. 553.

(h) *Hussey v. Christie*, 9 East, 433.

(i) 35 & 27 Vict. c. 63, see s. 67.

(j) *Frith v. Forbes*, 32 Law J., Ch. 10.

printers, and calenderers of Manchester, and the neighborhood, came to a public resolution or agreement, at a public meeting in Manchester, that they would receive goods to be dyed, dressed, bleached, &c., on the condition that such goods should not only be subject to the debts for the work and labor performed upon them, but also for the general balance due from the persons employing them for work and labor of the same kind performed upon goods which they had already delivered out of their possession, it was held that persons who had sent goods to the dyer or fuller, with notice of this resolution, conceded to them a lien for their general balance. (*k*)

624. *General lien by custom of trade—Warehousekeepers—Wharfingers.*—Where certain public warehousekeepers of the city of London claimed a right to retain various bales of wool under an ancient custom of that city, for all public warehousekeepers to have a general lien upon all goods from time to time housed in their warehouses in the name of the merchants or other persons by whom such public warehousekeepers were employed, for all moneys or any balance thereof due from such merchants to such public warehousekeepers for their advances, expenses, and charges, &c., it was held that the custom was bad, as the general lien claimed was not confined to goods the property of the person who employed or retained the warehousekeeper. "The custom," it was observed, "if supportable, would make the goods of a foreign merchant, which have been consigned to a London factor for sale, and by him put into the warehouse of the warehousekeeper for safe custody, liable to a private debt of the factor for expenses incurred in respect of other goods of third persons, which had been in his hands at former times, for charges contracted upon such goods, during any antecedent period of time, and that to an unlimited extent; which would be unreasonable and unjust, and obviously prejudicial in a very high degree to foreign trade, for no foreign merchant would consign his goods to this country for sale, if they could be made liable whilst warehoused for custody, to satisfy a debt already due from the factor to the warehousekeeper, in respect of other goods. (*l*) Dock compa-

(*k*) *Kirkman v. Shawcross*, 6 T. R. 3 Sc. 531; 3 B. N. C. 99; 35 Hen. 6 14.  
 (*l*) *Tindal, C. J., Leuckhart v. Cooper*, 33, cited *Rex v. Humphrey, McClell. & Y.* 193.

nies have no general lien for wharfage charges, and can not detain the goods of one man to satisfy wharfage dues and charges incurred by another. (*m*) If a wharfinger has a general authority to receive all goods directed for A B, and goods come to his wharf directed by mistake for A B, the real owner of the goods can not take them away without paying the charges incident to those particular goods; but it is equally clear that the wharfinger could not set up a lien on such goods for a general balance of accounts due from A B to him. (*n*)<sup>1</sup>

625. *Lien of policy-brokers.*—If a policy-broker is employed by an agent to effect a policy of insurance for the benefit of such agent, and there is no disclosure of the agency, and nothing to lead the broker to think that any third party is interested in the policy, and the insurance is accordingly effected in the name of the agent as owner, and a loss occurs, and the policy is allowed, after the loss, to remain in the broker's hands, and the latter then permits the agent to get into his debt, not knowing him to be an agent, the broker will have a lien as against the principal upon the policy, and upon the money he receives thereon from the underwriters, to the extent of the debt due to him from the agent, as well as for his commission and charges for effecting the policy. (*o*) But if there is the slightest indication of the agency to the broker, such as a declaration by a British subject in time of war that the property is neutral, (*p*) or a statement that the insurance is to be effected "for a correspondent in the country," (*q*) or that the property to be insured belongs to a merchant abroad who has consigned it to the agent with full power of disposition over it, and with authority to indorse the bill of lading, (*r*) the broker will have a lien only for his commission and charges for the insurance, and not for the balance due to him from the agent.

626. *Extinguishment of lien by abandonment of possession.*—If

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| ( <i>m</i> ) Dresser v. Bosanquet, 32 Law J.,<br>Q. B. 57; 4 B. & S. 460, 486. | Smith, 5 Taunt. 56.                               |
| ( <i>n</i> ) Richardson v. Goss, 3 B. & P. 123.                                | ( <i>p</i> ) Maauss v. Henderson, 1 East,<br>337. |
| ( <i>o</i> ) Mann v. Forrester, 4 Campb. 61.                                   | ( <i>q</i> ) Snook v. Davidson, 2 Campb. 218.     |
| Westwood v. Bell, Id. 355. Olive v.  | ( <i>r</i> ) Lanyon v. Blanchard, Ib. 597.        |

<sup>1</sup> A mere volunteer who is under no legal obligation to receive and keep goods, has not, except by special agreement, any lien for storage. Rivari v. Ghio, 3 E. D. S. (N. Y.) 364; Dunbar v. Pettee, 1 Daly (N. Y.) 112.

a bailee who has a right of lien upon property in his possession voluntarily parts with the possession of such property, the lien is gone; so that if he afterwards recovers possession of the property his right of lien does not revive; (s) but if it is stolen or taken away by a trespasser or by fraud, and he gets it back again, his right of lien is not extinguished. (t) Possession of goods and chattels may be given up, and the right of lien extinguished, although the goods and chattels are never actually removed from the premises of the party having the lien. (u) And, on the other hand, as the possession of the servant is the possession of the master, it follows that a depositary or bailee who has a right of lien upon goods in his possession does not lose his right by placing the goods in the hands of his servant or agent for custody, who is to hold them at his disposal. Warehousekeepers and wharfingers to whom goods have been delivered by masters of ships for safe custody, have been held to be the servants of such masters holding the goods at their disposal, so as to preserve the shipmaster's lien for the freight after the goods have been taken out of the ship. (v)

The right of lien being a mere personal right, which can not be parted with, it follows that a bailee who has got a lien can not sell his right to another, nor can he transfer as we have just seen, the property over which the lien extends, to another, without losing his right of lien, (x) unless the property has been pledged to secure the repayment of money advanced, with an express or implied power of sale, (y) for there is a clear distinction in this respect between a lien, which is a mere personal right of detention, and a pledge deposited to secure the repayment of money. (z)<sup>1</sup> An innkeeper, consequently, can not sell the horse of his guest for the expense of his keep, except within the city of London. (a) A sheriff can not sell an interest of this description, and he

(s) *Sweet v. Pym*, 1 East, 4.

(t) *Wallace v. Woodgate*, R. & M. 194.

(u) *Jacobs v. Latour*, 2 M. & P. 205.

(v) *Reeve v. Capper*, 5 B. N. C. 136.

(x) *Clerk v. Gilbert*, 2 B. N. C. 357.

(y) See *Johnson v. Stear*, 33 L. J., C. P. 130.

(z) *Donald v. Suckling*, L. R., 1 Q. B. 585.

(a) *Jones v. Pearle*, 1 Str. 556.

<sup>1</sup> *Urquhart v. McIver*, 4 Johns. (N. Y.) 114; *Nash v. Mosher*, 19 Wend. (N. Y.)



can not, consequently, seize property covered by the lien under an execution against the party claiming the lien; (b) but if the execution is against the owner of the goods, he is entitled then to seize them, after tendering the amount of the debt for which they are a security. A person may, as we have before seen, reserve to himself, by contract, a right to take and to hold goods as a security for the payment of a debt, so that he will be entitled to resume possession of the goods after he has parted with them, and to re-establish his lien, provided the rights of no third person have intervened.

627. *Statutory power of sale in discharge of a right of lien.*—By the Merchant Shipping Act, 1862, power is given to wharf or warehouse owners, in certain cases, to sell by public auction goods placed in their custody, and apply the proceeds of the sale in satisfaction and discharge of the charges upon them. (c)

628. *Tender of the debt in extinguishment of the right of lien.*—Wherever a person has a lien upon goods for the payment of money due upon them, whether he be an unpaid vendor in possession of goods sold, or a manufacturer or workman in possession of goods that have been worked up or repaired by him, or a pledgee holding chattels as a security for a debt, the lien may be at once extinguished, and a right to the possession of the goods created, by a tender of the money due upon them. (d) Where a lease was deposited with the defendants as a security for the repayment of £150 on a promissory note payable on demand, and the defendants agreed that they would not enforce their remedy upon the note so long as the maker should duly pay the interest thereon, the rent of the premises, and what might from time to time be due to them for beer, and if he failed in any of these respects, the defendants were to be at liberty, after notice, to sell the lease and to deduct the expenses of the sale, the principal money and interest, and any account then due from the plaintiff to the defendant, it was held that the moment the amount of the note was paid or tendered, there was an end of all the stipulations as to what should be done with the lease in the event of

(b) *Legg v. Evans*, 6 M. & W. 42. See  
*Young v. Lambert*, L. R., 3 P. C. Ca.  
 142.

(c) 25 & 26 Vict. c. 63, ss. 73-76.  
 (d) *Ratcliff v. Davies*, Cro. Jac. 244.

the non-payment of the note and interest, and that the plaintiff had a right to maintain an action of detinue to recover back his lease. (e)

629. *Detention of goods and chattels, deeds and securities, by one of several joint-owners or tenants in common.*—If two be possessed of chattels personal in common by divers titles, as of a horse, an ox, or a cow, &c., if the one take the whole to himself out of the possession of the other, the other hath no other remedy but to take this from him who hath done to him the wrong, to occupy in common, &c., when he can see his time.”

(f) Where two have an equal interest in a deed, and each may have occasion to use it, as, for instance, where the same deed grants Whiteacre to A, and Blackacre to B, it is manifest that both can not hold the deed at the same time; and to avoid any unseemly contest for the possession of it, it has been held that he who first gets hold of it is entitled to keep it. For fraud or force which may be used to get possession of the deed, either party may perhaps have a remedy against the other; but the title to the deed is ambulatory between those who may have an interest in, and may have occasion to use it, and each is entitled to keep the deed from the other so long only as he actually retains it in his custody and control, but no longer. (g)

630. *Re-delivery of chattels to one of several joint-bailors.*—If an action is brought by several joint bailors against a bailee for the non-delivery of goods deposited in his hands by a joint-bailment from all of them, it is a good defense to the action that the goods bailed by the plaintiffs to the defendant have been delivered up to one of them. “It is said,” observes Lord CAMPBELL, “that this is no defense, because the contract of bailment was not to deliver them except to the plaintiffs jointly. But, as in fact, one of the plaintiffs has got the goods, the question arises whether he can sue the defendants for giving them to himself. It would be contrary to all principle, and the cases show that it would be contrary to all law, if he could. I do not think an action could be maintained against bankers in this position more than against others; but it is not to be supposed they could therefore with impunity deliver up to one

(e) Chilton v. Carrington, 15 C. B. 105.

(f) Litt. sec. 323.

(g) Foster v. Crabb, 12 C. B. 136.

of a subsequent lucid interval lies on the party who asserts it. (*f*)<sup>1</sup>

406. There are two particular cases which will require special consideration: namely, the presumption of the continuance of debts, obligations, &c. until discharged or otherwise extinguished; and the presumption of the continuance of human life. With respect to the former of these—a debt once proved to have existed, is presumed to continue unless payment, or some other discharge, be either proved, or established by circumstances. (*g*) A receipt under hand and seal is the strongest evidence of payment, for it amounts to an estoppel, conclusive on the party making it; (*h*) but a receipt under hand alone, (*i*) or a verbal admission of payment, (*k*) is in general only prima facie evidence of it, and may be rebutted. Of the presumptive proofs of payment, the most obvious is that no demand has been made for a considerable time; and previous to 3 & 4 Will. 4, c. 42, s. 3, (*l*) the courts had,

(*f*) See *Banks v. Goodfellow*, L. Rep., 5 Q. B. 549, 570; Butl. Co. Litt. 246b, note (1); *Gresl. Ev. in Eq.* 368; *Att.-Gen. v. Parnther*, 3 Bro. C. C. 441; *White v. Wilson*, 13 Ves. 88.

(*g*) *Jackson v. Irvin*, 2 Camp. 50. Also in the Roman law, Cod. lib. 4, tit. 19, l. 1.

(*h*) *Gilb. Evid.* 158, 4th Ed.

(*i*) 1 *Greenl. Ev.* §§ 212 and 305, 7th Ed.

(*k*) *Tayl. Ev.* §§ 171 and 788, 4th Ed.

(*l*) Which enacts, that all actions for debt for rent upon an indenture of demise, all actions of covenant or debt

<sup>1</sup> A person proved to have been insane at any time is presumed to remain so until the contrary is proved. *Sprague v. Duel*, 1 *Clarke* (N. Y.) 90; *Saxon v. Whitaker*, 30 *Ala.* 237; *Breed v. Pratt*, 18 *Pick. (Mass.)* 115; *Ballew v. Clark*, 2 *Ired. (N. C.)* L. 23; *Titlow v. Titlow*, 54 *Pa. St.* 216; *Ripley v. Babcock*, 13 *Wis.* 425. But the rule does not apply to insanity caused by a violent disease. *Hix v. Whittemore*, 4 *Metc. (Mass.)* 545.

The general competency of a testator not being questioned, the burden of proving incompetency at the time a will was executed is on the contestant, and affirmative proof is requisite. *Allen v. Public Administrator*, 1 *Bradf. (N. Y.)* 378.

by analogy to the Statute of Limitations, established the artificial presumption, that where payment of a bond or other specialty was not demanded for twenty years, and there was no proof of payment of interest, or any other circumstance to show that it was still in force, payment or release ought to be presumed. (*m*) Thus, in *Colsell v. Budd*, (*n*) it was laid down by Lord Ellenborough, that "after a lapse of twenty years, a bond will be presumed to be satisfied; but there must either be a lapse of twenty years or a less time, coupled with some circumstance to strengthen the presumption." So, the fact of payment may be presumed from any other circumstance which renders that fact probable; (*o*) as, for instance, the settlement of accounts subsequent to the accruing of the debt, in which no mention is made of it. (*p*)<sup>1</sup> So, where a landlord gives a receipt for rent due up to a certain day, all former arrears are presumed to have been paid; for it is likely that he would take the debt of longest standing first. (*q*) So it is said, that where there is a competition of evidence on the question, whether a security has or has not been satisfied by payment, the possession of the uncanceled security by the claimant ought to turn the scale in his favor, since in the ordinary course of dealing the security is given up to the

upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, shall be commenced and sued within ten years after the end of the then session of Parliament, or within twenty years after the cause of action, but not after.

(*m*) *Oswald v. Legh*, 1 T. R. 270; *Washington v. Brymer*, Peake's Ev., App. xxv.

(*n*) 1 Camp. 27. See *Oswald v. Legh*, 1 T. R. 270.

(*o*) 3 Stark. Ev. 823, 3rd Ed. See *Cooper v. Turner*, 2 Stark. Ev. 497; *Lucas v. Novisilienski*, 1 Esp. 296; *Sellen v. Norman*, 4 C. & P. 80; *Pfiel v. Vanbatenberg*, 2 Camp. 439.

(*p*) *Colsell v. Budd*, 1 Camp. 27. See Dig. lib. 22, tit. 3, l. 26, referred to *ante*, § 320.

(*q*) Gilb. Ev. 157, 4th Ed.

<sup>1</sup> See *ante*, p. 621, note 1.

party who pays it. (r) And where land is conveyed to trustees in trust to pay debts, with remainder over, payment of the debts may be presumed from long possession by the remainderman, joined with other circumstances. (s)

Release as well as payment may be inferred from circumstances. (t)

407. On the same principle, although a revocation or surrender will not be presumed, (u) it may be inferred from circumstances. In *Doe d. Brandon v. Calvert*, (x) where in answer to an ejectment, the defendant set up a mortgage term made to a stranger eighteen years before, and neither accounted for his possession of it, nor proved any payment of interest under the mortgage; and the judge advised the jury to presume a surrender of the mortgage term, the verdict was set aside by the court; and Mansfield, C. J., said: "There is no circumstance here to lead to the supposition that the deed was surrendered, except the eighteen years' time; if the deed had been assigned or surrendered, the instrument whereby it had been assigned or surrendered ought to be in the possession of the plaintiff. No reason is assigned to account why it should not be there; the question is therefore whether, from the circumstance of the eighteen years only, a surrender can be presumed. I have never known any case, in which a shorter time than twenty years has been held sufficient to ground the presumption of a surrender; and that is often too short a time, for many times receipts and documents may be

(r) Per Lord Ellenborough, *Brembridge v. Osborn*, 1 Stark. 374; and see Dig. lib. 22, tit. 3, l. 24; and *Mascard. de Prob. Concl.* 477.

(s) *Anon.*, Vin. Abr. Ev., Q. a. pl. 7.

(t) *Washington v. Brymer*, Peake's

Ev., App. xxv.; *Pickering v. Lord Stamford*, 2 Ves. jun. 583; *Reeves v. Brymer*, 6 Id. 516; *Motz v. Moreau*, 13 Mo. P. C. C. 376.

(u) *Moreton v. Horton*, 2 Keb. 483

(x) 5 Taunt. 170.

lost. But it is enough to say, that twenty years is the time prescribed by act of Parliament as a bar to an ejectment, by analogy to which the doctrine of presumption has gone; and we might as well say a presumption might be raised by five years in assumpsit, or three years in trespass, as eighteen years in ejectment."

**408.** We next proceed to the presumptions respecting the continuance of human life. There is certainly, in the English law, no *præsumptio juris* relative to the continuance of life in the abstract; and in one case the Court of Queen's Bench said, that the law did not recognize the impossibility of a person who was alive in the year 1834, being still alive in the year 1837. (*y*) The death of any party once shown to have been alive, is matter of fact to be determined by a jury; and as the presumption is in favor of the continuance of life, the onus of proving the death lies on the party who asserts it. (*z*)<sup>1</sup>

**409.** The fact of death may, however, be proved by presumptive as well as by direct evidence. (*a*) When a person goes abroad, and has not been heard of for a long time, the presumption of the continuance of life ceases, at the expiration of seven years from the period when he was last heard of. (*b*)<sup>2</sup> And the same

(*y*) *Atkins v. Warrington*, 1 Chitty, Plead. 258, 6th Ed. See also *Benson v. Olive*, 2 Str. 920.

(*z*) *Smartle v. Penhallow*, 2 Lord Raym. 999; *Throgmorton v. Walton*, 2 Ro. 461; *Wilson v. Hodges*, 2 East, 312.

(*a*) *Thorn v. Rolff*, Dy. 185a, pl. 65; *Anders*, 20, pl. 42; *Webster v. Birchmore*, 13 Ves. 362.

(*b*) Per Lord Ellenborough, *Doe d. George v. Jesson*, 6 East, 80, 84; *Hopewell v. De Pinna*, 2 Camp. 113; *Doe d. Banning v. Griffin*, 15 East, 293; *Lee v. Willock*, 6 Ves. 605; *Rust v. Baker*, 8 Sim. 443; *Dixon v. Dixon*, 3 Bro. C. C. 510; *Ommaney v. Stilwell*, 23 Beav. 332; In the goods of *How*, 1 Swab. & T. 53.

<sup>1</sup> *Duke of Cumberland v. Graves*, 9 Barb. 595; *Gilleland v. Martin*, 3 McLean, 490; *Ashbury v. Sanders*, 8 Cal. 62.

<sup>2</sup> A person of whom nothing has been heard for seven

rule holds, generally, with respect to persons who are absent from their usual places of resort, and of whom no account can be given. (c) This is incorrectly spoken of

(c) Doe d. Lloyd v. Deakin, 4 B. & 1 W. Black. 404; Bailey v. Hammond, A. 433. See the judgment of Lord 7 Ves. 590; Doe d. France v. An- Ellenborough in Doe d. George v. draws, 15 Q. B. 756. Jesson, 6 East, 85; Rowe v. Hasland,

years, or more, will be presumed to be dead. Crawford v. Elliott, 1 Houst. (Del.) 465; Stevens v. McNamara, 36 Me. 176; Tilley v. Tilley, 2 Bland (Md.) 436; Flynn v. Coffee, 12 Allen (Mass.) 133; Smith v. Knowlton, 11 N. H. 191; White-side's appeal, 23 Pa. St. 114; Moffit v. Varden, 5 Cranch C. Ct. 658; Whiting v. Nichol, 46 Ill. 230; Wainbourn v. Schank, 2 N. J. L. (1 Pen.) 229; Osborn v. Allen, 26 N. J. L. (2 Dutch.) 388; Smith v. Smith, 5 N. J. Eq. (1 Hals.) 1; Eagle v. Emmet, 4 Bradf. (N. Y.) 117; 3 Abb. Pr. 218; Burr v. Sim, 4 Whart. (Pa.) 450; Bradley v. Bradley, Id. 173; Primm v. Stewart, 7 Tex. 178; Cofer v. Thurmond, 1 Ga. 538; Spurr v. Taimball, 1 A. K. Marsh. (Ky.) 278; Stinchfield v. Emerson 52 Me. 465; Newman v. Jenkins, 10 Pick. (Mass.) 515; Lomig v. Sternman, 1 Metc. (Id.) 204; Brown v. Jewett, 18 N. H. 230; Forsaith v. Clark, 21 N. H. (1 Fost.) 409; Winship v. Connor, 42 N. H. 341; Holmes v. Johnson, 42 Pa. St. 159.

The presumption of life of a person, once proved to be living, continues until the contrary is shown. Letts v. Brooks, Hill & D. Supp. (N. Y.) 36. See *ante*, note 1, p. 687.

After a possession of twenty years the court will, to quiet the title of the possessor, presume that a person absent beyond the seas, died at the time when he was last heard from, and that the possessor has a title under the administrator of the absentee. Godfrey v. Schmidt, 1 Cheves (S. C.) Part 2, 57.

Where dower has not been claimed for thirty-five years after the date of a deed, it raises a presumption that the parties entitled to it are not living. Ross v. Clore, 3 Dana (Ky.) 189.

Where the issue is whether there was ever such a person as A, under whom the plaintiffs claim, it is not necessary for the defendants to offer plenary proof that no such person ever existed, where the plaintiffs do not prove the fact that he did exist. Phelps v. Hughes, 1 La. Ann. 320.

Courts will presume the death of a testator, upon the production of letters testamentary. Tisdale v. Conn., &c. Ins. Co., 26 Iowa, 170.

As to what are not presumptions of death, it has been held

in some books as a presumption of law : (*d*) but it is in truth a mixed presumption, said to have been adopted by analogy to the statutes 1 Jac. 1, c. 11, s. 2, (*e*) and 19 Car. 2, c. 6, s. 2,—the former of which exempts from the penalties of bigamy, any person whose husband or wife shall be continually remaining beyond the seas by the space of seven years together, or whose husband or wife shall absent him or herself, the one from the other, by the space of seven years together, in any parts within the King's dominions, the one of them not knowing the other to be living within that time ; and the latter of which enacts, that persons in leases for lives, who shall remain beyond the seas, or else-

(*d*) See the judgment in *Nepean v. Doe d. Knight*, 2 M. & W. 894.

(*e*) This statute was repealed by 9 Geo. 4, c. 31, s. 22, which exempts from the penalties of bigamy "any person whose husband or wife shall have been continually absent from

such person for the space of seven years then last past, and shall not have been known by such person to be living within that time." This statute was in its turn repealed by 24 & 25 Vict. c. 95, and re-enacted by 24 & 25 Vict. c. 100, s. 57.

that such presumption does not arise from the facts that a person, twenty-two years ago, was in "bad health," and would, if now living, be eighty years old, even though, on recent inquiry, his name was not known at the post-office of a large city (his former residence), nor inserted in its directory—there being no evidence of the sort or degree of bad health, nor of inquiries having been made about him among his friends, nor of his having ever left the place of his former residence; *Matter of Hall, Wall. Jr.* 85; that the presumption arising from extreme old age, up to one hundred years, is not conclusive as to death. *Burney v. Ball*, 24 Ga. 405.

The presumption of death which arises at the expiration of seven years can not operate retrospectively; *Clarke v. Canfield*, 15 N. J. L. (2 McCart.) 119; and see a New Hampshire case which holds that there is no presumption of death, or marriage, or the birth of children, or the reverse. The party who asserts that a person is dead without issue, must offer some evidence of those facts. If the events are remote, slight proof may satisfy a jury. *Emerson v. White*, 29 N. H. (9 Fost.)



where absent themselves from the realm for more than seven years, shall thereupon, in the absence of proof to the contrary, to be deemed naturally dead. (*f*) But where a party has been absent for seven years, without having been heard of, the only presumption arising is that he is dead; there is none as to the time of his death.<sup>1</sup> And if it be sought to establish the precise time of such person's death, this must be done affirmatively, by evidence of some sort beyond the mere fact, that seven years have elapsed since such person was last heard of. (*g*) Cases in

(*f*) 4 Burge's Col. Law, 10, 11; and F. N. B. 196 L.), which might Shelford's. Real Property Statutes, 176, 177, 4th Ed. There are traces to be found, in the books, of this sort of presumption before the statutes (see (*g*) Doe d. Knight v. Nepean, 5 B. Thorn v. Rolff, Dyer, 185a, pl. 65; & Ad. 86; affirmed on error, 2 M. &

<sup>1</sup> The probable time of death may be inferred from circumstances, but if no sufficient facts are shown from which to draw a reasonable inference that death occurred before the lapse of seven years, the person will be accounted in all legal proceedings, as having lived during that period; Eagle v. Emmet, 4 Bradf. (N. Y.) 117; Garden v. Garden, 2 Houst. (Del.) 574; White v. White, 26 Me. 361; Merritt v. Thompson, 1 Hilt. (N. Y.) 550; Gibbes v. Vincent, 11 Rich. (S. C.) 323; Puckett v. State, 1 Sneed. (Tenn.) 355; see to the contrary however, State v. Moore, 11 Ired. (N. C.); Spencer v. Roper Id. 333, which holds that his death is presumed to have taken place during, and not necessarily at the expiration of that time. It was held in New York that where a person has not been heard from in seven years, and, when last heard from, he was beyond sea, without having any known residence abroad, the legal presumption is that he is dead; but there is no presumption that he died at any particular time, or even on the last day of the seven years. McCartee v. Canal, 1 Barb. (N. Y.) Ch. 455.

In New Jersey it has been held that the statute (Nixon Dig. 211, § 4) which raises a presumption of the death of a person absenting himself for seven years without being heard from, was desinged to furnish a legal presumption of the time of the death, as well as of the fact of the death. Clarke v Canfield, 15 N. J. L. (2 McCart.) 119.

which this presumption has come in conflict with the presumption of innocence have been already considered ; (*h*) and a jury may find the fact of death, from the lapse of a shorter period than seven years, if other circumstances concur. (*i*)

410. As connected with the subject of the continuance of human life, it remains to notice one which has embarrassed more or less the jurists and lawyers of every country. We allude to those unfortunate cases which have from time to time presented themselves where several persons, generally of the same family, have perished by a common calamity ; such as shipwreck, earthquake, conflagration, or battle ; and where the priority in point of time, or the death of one over the rest, exercises an influence on the rights of third parties. The civil law and its commentators were considerably occupied with questions of this nature, and seem to have established as a general principle (subject, however, to exceptions), that, where the parties thus perishing together were parent and child, the latter, if under the age of puberty, was presumed to have died first ; but if above that age, the rule was reversed ; while in the case of husband and wife, the presumption seems to have been in favor of the survivorship of the husband. (*k*) The French lawyers also, both ancient and modern, have taken much pains on this subject. (*l*) All the theories that have been formed respecting it, are based on the assumption that the party deemed to have survived

W. 894. And see *In re Lewes' Trusts*, L. Rep., 6 Ch. Ap. 556 ; *Reg. v. Lumley*, L. Rep., 1 C. C. 196 ; *Re Phené*, L. Rep., 5 Ch. App. 139.

(*h*) *Supra*, sect. 1 sub-sect. 3, § 334.

(*i*) 1 Greenl. Ev. § 41, 7th Ed.

(*k*) 1 Greenl. Ev. § 29, 7th Ed. ;

Dig. lib. 34, tit. 5.

(*l*) For the views of the old French lawyers, see Burge's Colonial Law, vol. 4, chap. 1, sect. 1 ; and for the law of France at the present day, Code Civil, liv. 3, tit. 1, chap. 1, Des Successions, §§ 720, 721, 722.

was likely, from superior strength, to have struggled longer against death than his companion. Now even assuming that, *prima facie*, a male would struggle longer against death than a female, a person of mature age than one under that of puberty, or very far advanced in years, the position is at best no more than a general rule; for, not only in particular instances would the superior strength or health of the party supposed to be the weaker reverse all; but the rules rest on the hypothesis, that both parties were in exactly the same situation with reference to the impending danger; whereas, it is obvious that their respective situations with reference to it, must usually be unascertainable in the fury of a battle, or amidst the horrors of an earthquake or a shipwreck. And the moral condition of the parties must not be overlooked; the brave survive the fearful and the nervous. Add to this, that according to some modern physiologists, in some kinds of death the strongest perish first. (*m*) However that may be, in opening the door to this class of questions, the lawyers of Rome and France lost sight of the salutary maxim "*Nimia subtilitas in jure reprobatur.*" (*n*) The English law has judged more wisely; for, notwithstanding some questionable dicta, the true conclusion from the authorities seems

(*m*) See Beck's *Med. Juris*, p. 397, 7th Ed., where is related an incident furnished by a modern traveler, who, in giving an account of a caravan being in want of water in a Nubian desert, says that "the youngest slave bore the thirst better than the rest; and while the grown-up boys all died, the children reached Egypt in safety." The same author adds, "as to *habit* and variety of constitution, all such that have a tendency to affections of the head and lungs, should

be deemed the first victims, in case the causes of death are of a description to affect these." We subjoin the following statement, though not from a work of authority: "It seems that death from hunger occurs soonest in the young and robust, their vital organs being accustomed to greater action than those of persons past the adult age." Chambers' *Pocket Miscellany*, Vol. 8, p. 119.

(*n*) 4 Co. 5b; 5 Co. 121a; 3 Bulst. 65.

to be, that it recognizes no artificial presumption in cases of this nature; but leaves the real or supposed superior strength of one of the persons perishing by a common calamity, to its natural weight, *i.e.* as a circumstance proper to be taken into consideration by a judicial tribunal, but which standing alone is insufficient to shift the burden of proof. (o) When, therefore, a party on whom the onus lies, of proving the survivorship of one individual over another, has no evidence beyond the assumption that, from age or sex that individual must be taken to have struggled longer against death than his companion, he can not succeed. But then, on the other hand, it is not correct to infer from this, that the law presumes both to have perished at the same moment—this would be establishing an artificial presumption against manifest probability. The practical consequence is, however, nearly the same; because if it can not be shown which died first, the fact will be treated by the tribunal as a thing unascertainable, so that for all that appears to the contrary both individuals may have died at the same moment. The law, as stated above, has been fully established in the case of *Underwood v. Wing*

(o) One of the best known cases on this subject is that of *General Stanwix and his daughter, R. v. Dr. Hay*, 1 W. Bl. 640. The celebrated Mr. Fearne composed two ingenious arguments, one in favor of each of the claimants. See his Works. There is, however, a prior case of *Hitchcock v. Beardsley*, West. Rep. t. Hardw. 445; and an old case of *Broughton v. Randall*, Cro. El. 503, where a father and son were hanged together in one cart, and the son was presumed to have survived in consequence of his appearing to struggle longer, and some other cir-

cumstances. The cases of late years have become comparatively numerous. See *Taylor v. Diplock*, 2 Phillim. 261; *Wright v. Netherwood (or Samuda)*, 2 Phillim. 266, note (c); *Mason v. Mason*, 1 Meriv. 308; *Colvin v. H.M. Procurator-General*, 1 Hagg. N. S. 92; *In the goods of Selwyn*, 3 Id. 748; *In the goods of Murray*, 1 Curteis, 596; *Satterthwaite v. Powell*, Id. 705; *Sillick v. Booth*, 1 Y. & C. C. C. 117; *Durrant v. Friend*, 5 De Gex & S. 343; *Underwood v. Wing*, 4 De G., M. & G. 633; 1 Jurist, N. S. 160. &c.

(*p*)—the judgment in which was affirmed by Lord Chancellor Cranworth, assisted by Wightman, J., and Martin, B.; (*q*) and finally by the House of Lords in the case of *Wing v. Angrave*. (*r*)<sup>1</sup>

(*p*) Per Romilly, M. R.; 19 Beav. 459.

(*q*) 4 De G., M. & G. 633; 1 Jurist, N. S. 169.

(*r*) 8 H. L. C. 183.

<sup>1</sup> See remarks as to this presumption of the civil law, *ante*, p. 529, note 1. In case of the death of several persons by a common calamity, presumptions arising from age, sex, strength, &c., will never be resorted to as to which of them survived, when there is any evidence, however slight, as to the facts. *Pell v. Ball*, 1 Cheves (S. C.) Part 2, 99.

In a question of survivorship, arising out of a common calamity, the legal presumption founded upon the circumstances of age, sex, or physical strength, does not obtain in our jurisprudence, either as a doctrine of the common law, or as an enactment of the legislative authority. It is a doctrine of the civil law. *Smith v. Croom*, 7 Fla. 81.

But when the calamity, though common to all, consists of a series of successive events, separated from each other in point of time and character, and each likely to produce death upon the several victims, according to the degree of exposure to it, the difference of age, sex, and physical strength becomes a matter of evidence, and may be considered. *Ib*.

Where a husband, wife, and daughter perished at sea by the same disaster, and there was no evidence as to who was the survivor—Held, that there was no presumption of law that the daughter survived the mother; but, it seems, that it will be presumed that the husband survived his wife. *Mockring v. Mitchell*, 1 Barb. (N. Y.) Ch. 264.

## SUB-SECTION VIII.

## PRESUMPTIONS IN DISFAVOR OF A SPOILIATOR.

|   | PARAGRAPH |
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| Maxim "Omnia præsumuntur contra spoliatores" . . . . .  | 411       |
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| Eloigning, &c. instruments of evidence, or introducing the crimen<br>falsi into legal proceedings . . . . . | 412       |
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411. Another very important and rather favorite maxim is, "Omnia præsumuntur contra spoliatores," (s) or "Omnia præsumuntur in odium spoliatoris," (t) —a maxim resting partly on natural equity, but much strengthened by the artificial policy of law. One of the leading cases on this subject is that of *Armory v. Delamirie*, (u) where a person in a humble station of life, having found a jewel, took it to the shop of a goldsmith to inquire its value, who, having got the jewel into his possession under pretense of weighing it, took out the stones, and on the finder refusing to accept a small sum for it, returned to him the empty socket. An action of trover having been brought, to recover damages for the detention of the stone, the jury were directed that, unless the defendant produced the jewel, and thereby showed it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels that would fit the socket, the measure of their

(s) 2 Ev. Poth. 336; 1 Stark. Ev. 564, 3rd Ed.; 10 H. L. Ca. 591. (u) 1 Stra. 505. And see *Mortimer v. Craddock*, 7 Jur. 45.  
(t) Lofft, M. 389.

damages. In the great case of *Annesley v. The Earl of Anglesea*, (*v*) the circumstances which pressed most against the defendant were, that he had caused the plaintiff, who claimed the title and family estate as heir, to be kidnapped and sent to sea, and afterwards endeavored to take away his life on a false charge of murder—facts which one of the judges said, spoke more strongly in proof of the plaintiff's case than a thousand witnesses. So, as has been well said, if it be shown that a plaintiff has been suborning false testimony, and has endeavored to have recourse to perjury, it is strong evidence that he knew perfectly well that his cause was an unrighteous one. (*x*) And in cases of highway robbery the law, in odium spoliatoris, will presume fear whenever property is taken with such circumstances of violence or terror, or threatening by word or gesture, as would in common experience induce a man to part with his property from an apprehension of personal danger; (*y*) so that, even where the prosecutor sought out the robber, and submitted to be robbed by him for the purpose of bringing him to justice, this was held to be robbery on the part of the accused. (*z*) In the Roman law, although the general rule was that money paid was presumed to be in discharge of a debt, yet where a man who was sued for a debt, denied having received the money, proof that he had in point of fact received it, turned on him the burden of showing that it was in payment of a debt. (*a*) The application of the maxim to international law will be considered in another place. (*b*)

(*v*) 17 Ho. St. Tr. 1140, 1430, per Mounteney, B.

(*x*) Per Cockburn, L. C. J., *Moriarty v. London, Chatham and Dover Railway Co.*, L. Rep., 5 Q. B. 314, 319.

(*y*) 2 East, P. C. 711.

(*z*) Norden's case, cited Foster, C. L. 129.

(*a*) Dig. lib. 22, tit. 3, l. 25.

(*b*) *Infra*, sub-sect. 9.

412. But the most usual application of this principle is where there has been any forensic malpractice—by eloigning, suppressing, defacing, destroying, or fabricating documents, or other instruments of evidence, or introducing into legal proceedings any species of the *crimen falsi*. This not only raises a presumption that the documents or evidence eloigned, suppressed, &c., would, if produced, militate against the party eloigning, suppressing, &c., but procures more ready admission to the evidence of the opposite side. (c) “If,” says L. C. J. Holt, “a man destroys a thing that is designed to be evidence against himself, a small matter will supply.” (d) This rule is evidently based on the principle that no one shall be allowed to take advantage of his own wrong; and several instances of its application are to be found in the books. Thus, in the case of *R. v. The Countess of Arundel*, (e) where the crown was entitled at law to certain land, by reason of an attainder for high treason, a suit in equity, to recover the lands, was commenced by the attorney-general against the defendant; and on its being shown that the deeds whereby the estate came to the party attainted were not extant, but were very strongly suspected to have been suppressed and withheld by some one under whom the defendant claimed, a decree was made that the crown should hold and

(c) Ph. & Am. Ev. 458. See *Roe d. Haldane v. Harvey*, 4 Burr. 2484.

(d) *Anon.*, 1 L. Raym. 731.

(e) Hob. 109. According to that report, there was only a vehement suspicion that the deeds had been suppressed; but, in the case of *Cowper v. Earl Cowper*, 2 P. Wms. 749, Sir Jos. Jekyll, M. R., says that he had caused the register book to be examined, from which it appeared that the

deeds had been proved to have been extant and duly executed. For other instances of the manner in which the spoliation of documents is dealt with by courts of equity, see the cases there cited, and also *Dalston v. Coatsworth*, 1 P. W. 731; *White v. Lady Lincoln*, 8 Ves. 363; *Blanchet v. Foster*, 2 Ves. sen. 264; and *The Att.-Gen. v. The Dean of Windsor*, 24 Beav. 679.



enjoy the land till the defendant should produce the deeds, and the court thereupon take further consideration and order. So it would seem, that if the question were whether a former will had been revoked by a will made subsequently, the contents of which were said to differ from those of the former will,—although, the later will not being produced, it did not appear wherein the difference consisted,—evidence of spoliation on the part of the claimant under the former will, would lay a fair foundation for the presumption, that it had been revoked by the later will. (*f*) So if a man refuses, after notice, to produce an agreement, it will be presumed to have been properly stamped; (*g*) and it has been held at *Nisi Prius*, that where one of the parties to a suit has fraudulently obtained a document from a witness, whose property it is, and who is called on to produce it under subpoena duces tecum, secondary evidence of the contents of the document may be given without notice to produce the original. (*h*)<sup>1</sup>

413. It is said that the presumption against the spoliator of documents, is not confined to assuming those documents to be of a nature hostile to him, and procuring a more favorable reception for the evidence of his opponent; but that it has the further effect, of casting suspicion on all the other evidence adduced by the party guilty of the malpractice. (*i*) “*Qui semel*

(*f*) See per Lord Mansfield, *Harwood v. Goodright*, Cowp. 87, 91.

(*h*) *Leeds v. Cook*, 4 Esp. 256.

(*g*) *Crisp v. Anderson*, 1 Stark.

(*i*) *Phill. & Am. Ev.* 458.

<sup>1</sup> The holder of a note, who intentionally burns it, can not maintain an action thereon. And a party who wrongfully takes or converts a note to his own use, is answerable for the face of it; *Decker v. Matthew*, 2 Kernan, 313. And if a drawee tortiously destroy a draft presented for acceptance, he is liable thereon or therefor to the same extent as if he had accepted it. *Edwards on Bills and Notes*, 418.

malus, semper præsumitur esse malus eodem genere."

(*k*) In the case of *Doe d. Beanland v. Hirst*, (*l*) Bayley, J., is reported to have told the jury, that they were to consider the circumstance of the erasure in a certain deed; observing that a man who was capable of making an alteration in one deed, might be capable of suppressing another, if within his power. And the presumption arising from the fabrication or corruption of instruments of evidence, is even stronger than that arising from the suppression or destruction of them. (*m*)

414. However salutary, and in general equitable, the maxim, "Omnia præsumuntur contra spoliatores," must be acknowledged to be, it has been made the subject of very fair and legitimate doubt, whether it has not occasionally been carried too far. "The mere non-production of written evidence," says Sir W. D. Evans, (*n*) "which is in the power of a party, generally operates as a strong presumption against him. I conceive that has been sometimes carried too far, by being allowed to supersede the necessity of other evidence, instead of being regarded as merely matter of inference, in weighing the effect of evidence in its own nature applicable to the subject in dispute." So, in the case of *Barker v. Ray* (*o*) Lord Eldon said: "This court has a peculiar jurisdiction in cases of spoliation. . . . The jurisdiction of the court in matters of spoliation has gone a long way; indeed, it has gone

(*k*) Cro. Car. 317. The text of the canon law went further, laying it down, "Semel malus, semper præsumitur esse malus." Sext. Decretal. lib. 5, tit. 12, De Reg. Jur. R. 8. But the commentators on that law seem disposed to restrict its effect to misconduct ejusdem generis. See Gibert, Corp. Jur. Can. Proleg. Pars Post. tit.

7, Cap. 2, § 2, n. 20<sup>c</sup>; also Struvius, Synt. Jur. Civ. Exercit. 28, § 18, note (ζ), by Müller, and *infra*, sect. 3, subsect. 1.

(*l*) 11 Price, 488.

(*m*) 1 Stark. Ev. 564, 3rd Ed.

(*n*) 2 Evans's Poth. 337.

(*o*) 2 Russ. 72, 73.

to such a length that, if I did not think myself bound by authority and practice, I should have great difficulty in following them so far. To say that, if you once prove spoliation, you will take it for granted that the contents of the thing spoliated are what they have been alleged to be, may be, in a great many instances, going a great length."<sup>1</sup> Even when the positive fabrication of evidence is proved against a party, tribunals whose object is the ascertaining of truth, will consider the nature of the case, and the temptation which might have led to fabrication. Is there anything impossible in the suggestion, is it even unlikely, that in many cases the fabrication of evidence has been resorted to under the apprehension, perhaps the certain knowledge, that similar malpractice will be exercised by the other side? (*p*) Suppose a man is sued on a bond which he knows to be a forgery, but feels that it is altogether out of his power to prove it so. "Forge a release," or "Bribe a witness to prove payment," (*q*) are suggestions too obvious not to have been occasionally acted on.

(*p*) 3 Benth. Jud. Ev. 168.

(*q*) Id. "One of the greatest and most difficult points in the Douglas cause," observes Sir W. D. Evans, "arose from Sir John Stewart having fabricated four letters, as received from La Marre, the surgeon; a conduct certainly very suspicious, and calcu-

<sup>1</sup> So a refusal to produce books and papers upon notice given, does not warrant the presumption that if produced, they would show the facts to be as alleged by the party giving notice; the only effect of such refusal is that parol evidence of their contents may be given: and if such secondary evidence be imperfect, vague, and uncertain, as to dates, sums, &c., every intendment and presumption shall be against the party who might remove all doubt by producing the higher evidence. Some general evidence of such parts of their contents as are applicable to the case, must first be given before any foundation is laid for any inference or intendment on account of their non-production. *Life & Fire Ins. Co. v. Mechanic Fire Ins. Co.*, 7 Wend. 31.

**415.** Whatever weight may be legitimately attached to this presumption in civil cases, great care must be taken in criminal cases, where life or liberty are at stake, not to give to spoliation, or similar acts, any weight to which they are not entitled. Nations and ages differ in the tone of moral feeling diffused through society, and in their reverence for the sacredness of an oath; men differ in strength of conscientious principle, as well as in courage; and tribunals differ in ability and impartiality, and in the quantity of evidence which they exact for condemnation. Undoubtedly, the suppression or fabrication of evidence by a party accused of a crime, is always a circumstance, frequently a most powerful one, to prove his guilt. But many instances have occurred of innocent persons—alarmed at a body of evidence against them which, although false or inconclusive, they felt themselves unable to refute—having recourse to the suppression or destruction of criminative, and even to the fabrication of exculpatory testimony. (r) Sir Edward Coke relates a now well-known, but not on that account less remarkable or striking instance of this. (s) An uncle had the bringing up of his niece, who was entitled to some landed property under her father's will, of which she would become possessed at the age of sixteen, and to which the uncle was next heir.

lated to induce a strong presumption against the general veracity of his account. I believe the true conclusion, from all the circumstances in that cause, to be that which was drawn by the House of Lords in support of the filiation; but it is impossible for great doubt not to hang upon a case affected by such a circumstance." 2 Ev. Poth. 337, note (a).

(r) 1 Stark. Ev. 565, 3rd Ed; Ph. & Am. Ev. 467. Innocent persons have

occasionally endeavored to defend themselves by setting up false alibis; and cases have probably occurred where the accused, though innocent, could not avail himself of his real defense, without criminating others whom he is anxious not to injure, or even criminating himself with respect to other transactions.

(s) 3 Inst. ch. 140, p. 232; cited also 2 Hale. P. C. 290; 2 Ev. Poth. 338, Wills, Circ. Evid. 52, 3rd Ed.

When she was about eight or nine years old, he was one day correcting her for some offense, when she was heard to say, "Oh, good uncle, kill me not!" After this time the child could not be heard of, though much inquiry was made after her; and the uncle being committed to jail on suspicion of her murder, was admonished by the justices of assize to find out the child against the next assizes. Unable to do this, he dressed up another child to represent her; but, the falsehood being detected, he was convicted and executed for the supposed murder. It afterwards appeared, however, that on being beaten by her uncle, the niece had run away into an adjoining county, where she remained until the age of sixteen, when she returned to claim her property. "Which case," he adds, "we have reported for a double caveat: first to judges, that they in case of life judge not too hastily upon bare presumption; and, secondly, to the innocent and true man, that he never seek to excuse himself by false or undue means, lest thereby he offend God (the Author of truth) overthrow himself, as the uncle did." A case is also related where, in a large company, a valuable trinket belonging to one of the party was suddenly missed. On the proposal of one of the company, all agreed to be searched, except one, who, by an obstinate refusal, drew down on himself strong suspicion. He, however, succeeded in obtaining a private audience of the master of the house; and on his pockets being turned inside out, there was discovered, instead of the trinket sought, a portion of eatables, which he had taken to carry home to his wife, who had no means of procuring food. (t)

## SUB-SECTION IX.

## PRESUMPTIONS IN INTERNATIONAL LAW.

|   | PARAGRAPH |
|---|-----------|
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| Presumptions relating to domicil . . . . .  | 421       |
| Other presumptions . . . . .  | 422       |

416. We propose now to consider certain presumptions to be found in international law.

417. The public international law, as is well known, is adopted by the common law, and is held to be part of the law of the land. (*u*) "*In republica maxime conservanda sunt jura belli.*" (*x*)

418. Where the subject of one state is also the independent sovereign of another, he is, of course, not responsible to the laws of the former state for acts done by him as such sovereign. (*y*) And it seems that, in respect to any act done by such a person out of the realm of which he is a subject, or any act as to which it might be doubtful whether it ought to be attributed to the character of the sovereign prince or to that of the subject, the act ought to be presumed to have been done in the character of the sovereign prince. (*z*)

(*u*) 4 Blackst. C. 67.

(*x*) 2 Inst. 58.

(*y*) *The Duke of Brunswick v. The King of Hanover*, 6 Beav. 1; *Wadsworth v. The Queen of Spain*, 17 Q.

B. 171; *De Haber v. The Queen of Portugal*, Id. 196.

(*z*) *The Duke of Brunswick v. The King of Hanover*, 6 Beav. 57, 58.

419. The principle of presuming in disfavor of a spoliator (*a*) is recognized in international law, (*b*) especially in those cases where papers have been spoliated by a captured party, (*c*) and where neutral vessels are found carrying despatches from one part of the dominions of a belligerent power to another. (*d*)

420. With respect to private international law, its very existence rests on one important presumption. "In the silence of any positive rule," says Dr. Story, "affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests." (*e*)<sup>1</sup> So, says Professor Greenleaf, "A spirit of comity, and a disposition to friendly intercourse are

(*a*) See this subject generally, *supra*, 703.  
sub-sect. 8.

(*d*) The *Atalanta*, 6 Robins. Adm.

(*b*) 1 Greenl. Ev. § 31, 7th Ed.

R. 440.

(*c*) The *Hunter*, 1 Dods. Adm. Rep. 480; The *Johanna Emilie*, 18 Jur.

(*e*) Story, *Confl. of Laws*, § 38, 5th Ed.

<sup>1</sup> "It is needless to enumerate here the instances in which, by the general practice of civilized countries, the law of the one will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned. The cases of contracts made in a foreign country are familiar examples, and courts of justice have always expounded and executed them according to the laws of the place in which they were made, provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote friendly interests between the sovereignties to which they belong, that courts of justice have continually acted upon it as a part of the voluntary law of nations;" per Taney, C. J., in *Bank of Augusta v. Earle*, 13 Pet. 519, 589.

presumed to exist among nations as well as among individuals." (*f*)

421. There are other presumptions to be found in this branch of jurisprudence. Thus, the place of a person's birth is considered as his domicil, if it is at the time of his birth the domicil of his parents. (*g*) But a more important rule is, that the place where a person lives must be taken, *prima facie*, to be his domicil, until other facts establish the contrary. (*h*) Where the family of a married man resides, is generally to be deemed his domicil, (*i*)<sup>1</sup> and that of an unmarried man will be taken to be in the place where he transacts his business, exercises his profession, or assumes and exercises municipal duties or privileges (*j*)<sup>2</sup> And it is said to be a principle, that where the place of domicil is fixed or determined by positive facts, presumptions from mere circumstance will not prevail against those facts. (*k*) This does not mean that presumptive evidence is inadmissible to prove domicil; and, indeed, it amounts to little more than

(*f*) 1 Greenl. Ev. § 43, 7th Ed.

Bernes, 3 Hagg. N. R. 437.

(*g*) Story, Confl. of Laws, § 46, 5th Ed.

(*i*) Story, Confl. of Laws, § 46, 5th Ed.

(*h*) Id.; Bruce v. Bruce, 2 B. & P. 229, 230, note (*a*); Bempde v. Johnstone, 3 Ves. Jun. 198; Stanley v.

(*j*) Id. § 47, 5th Ed.

(*k*) Story, Confl. of Laws, § 47, 5th Ed.

<sup>1</sup> See Hump v. Smith, 11 N. H. 48.

<sup>2</sup> But the above are only to be regarded as presumptions, when the domicil is voluntary; if the residence be by constraint, as by banishment, arrest, or imprisonment, the antecedent domicil of the party remains; Story, Conflict of Laws, § 47; Woodstock v. Hartland, 21 Vt. 563. It can not be said that a person has come to reside in a place where he is imprisoned by force of law. The time which should transpire under such imprisonment can not be counted as so much time of residence toward gaining a settlement. Danville v. Putney, 6 Vt. 512.



saying, that the weaker evidence shall not be allowed to prevail against the stronger.<sup>1</sup>

422. It is also a principle of international law that generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country, (*l*) for, in the latter case, the law of the place of performance is to govern, (*m*) because such may well be presumed to have been the intention of the parties. (*n*) So, a foreign marriage will be presumed to have been celebrated, with the solemnities required by the law of the place where it is celebrated. (*o*) And the general presumptions against crime, fraud, covin, immorality, &c., are applicable to acts done abroad.

(*l*) Per Lord Mansfield, Robinson v. Bland, 1 W. Bl. 256, 258, 259.

(*m*) Story, Conf. of Laws, § 242 (1), 280-282.

(*n*) Id. § 76.

(*o*) R. v. The Inhabitants of Brampton, 10 East, 282, 289, per L. Ellenborough.

<sup>1</sup> See Dr. Lieber's *Encyclopædia Americana*, Art. DOMICIL. A new domicile must be actually acquired before an old one is lost. Story, *Conflict of Laws*, § 47; *Jennison v. Hapgood*, 10 Pick. 77; *Moore v. Wilkins*, 10 N. H. 452; and see generally as to domicile, *Blanchard v. Stearns*, 5 Met. 298; *Foster v. Hall*, 4 Humph. 346; *Isham v. Gibbons*, 1 Bradf. 70; *Crawford v. Wilson*, 4 Barb. 505; *Harvard College v. Gore*, 5 Pick. 370; *Lyman v. Fiske*, 7 Id. 231; *Re Wrigley*, 4 Wend. 602; *Exeter v. Brighton*, 15 Me. 58; *Jefferson v. Washington*, 19 Id. 293; *Phillips v. Kingfield*, Id. 375; *Hylton v. Brown*, 1 Wash. C. C. 299.

## SUB-SECTION X

## PRESUMPTIONS IN MARITIME LAW.

|  | PARAGRAPH |
|--|-----------|
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**423.** Among the most important presumptions in maritime law are those relating to seaworthiness.

Every ship insured on a voyage policy, sails under an implied warranty that she is seaworthy. It is not necessary to inquire whether the assured acted honestly and fairly in the transaction; however just and honest his intentions may have been, if he was mistaken in the fact, and the vessel was not seaworthy, the underwriter is not liable. (*p*) But if a ship, shortly after sailing, turns out to be unfit for sea, without apparent or adequate cause, the burden of proof is thrown on the assured; and a jury ought to presume that the unseaworthiness existed before the commencement of the voyage. (*q*) And this rule holds, even though the ship encountered a violent storm, unless it can fairly be inferred that the damage resulted from the storm. (*r*) The implied warranty of seaworthiness, however, does not at least in general, extend to time policies. (*s*)

(*p*) *Park Ins.* 332, 7th Ed.; *Arn. Ins.* 689, 690, 2nd Ed.; *Knill v. Hooper*, 2 H. & N. 277; *Douglas v. Scougall*, 4 Dow, 269.

(*q*) *Munro v. Vandam*, *Park, Ins.* 333, note (*a*), 7th Ed.

(*r*) *Douglas v. Scougall*, 4 Dow, 269;

*Watson v. Clark*, 1 Dow, 336; *Parker v. Potts*, 3 Dow, 23.

(*s*) *Gibson v. Small*, 4 Ho. Lo. Cas. 353; *Thompson v. Hopper*, 6 E. & B. 172, 937; *Faucus v. Sarsfield*, Id. 192; *Biccard v. Shepherd*, 14 Moore, P. C. C. 471, 493.

424. Where a vessel is missing, and no intelligence of her has been received within a reasonable time after she sailed, it shall be presumed that she foundered at sea. (*t*) Thus, where a ship was insured in 1739, from North Carolina to London, with a warranty against captures and seizures, an action was brought against the underwriters,—alleging a loss by sinking at sea,—which action came on to, be tried in M. T., 17 Geo. II. The only evidence, however, was that the ship had sailed on her intended voyage, and had never since been heard of. On this it was objected on the part of the defendant, that as captures and seizures were excepted, it lay on the assured to prove a loss as alleged in the declaration; but Lee, C. J., said it would be unreasonable to expect evidence of that; for as everybody on board was presumed to be drowned, the plaintiff had given the best proof the nature of the case admitted of; and he left the case to the jury, who found for the plaintiff. (*u*) There is no precise time for this presumption, fixed either by the common or general maritime law; (*v*) although the laws of some countries have peculiar provisions on the subject; (*x*) but the court and jury will be guided by the circumstances laid before them, and the nature of the voyage and navigation. In order, however, to raise this presumption, it must be distinctly shown that the ship left port, bound on her intended voyage. (*y*)

When no express time is fixed for the commencement of a voyage, the law implies a stipulation, that it shall be commenced without unreasonable delay,

(*t*) Park, Ins. 105, 7th Ed.; Green v. Brown, 2 Str. 1199; *Houstman v. Thornton*, Holt, N. P. C. 243.

(*u*) Green v. Brown, 2 Str. 1199, 1200.

(*v*) Park, Ins. 106, 7th Ed.; *Houstman v. Thornton*, Holt, N. P. C. 243, per Gibbs, C. J.

(*x*) Park, Ins. 107, 7th Ed.

(*y*) *Koster v. Innes*, R. & M. 333; *Cohen v. Hinckley*, 2 Camp. 51.

and that there shall be no unnecessary deviation from it when once commenced. (z) And where there is a voyage policy "at and from" a port, there is an implied undertaking by the assured, that the ship shall be at that port within such time that the risk shall not be materially varied. (a)

## SUB-SECTION XI.

### MISCELLANEOUS PRESUMPTIONS.

|   | PARAGRAPH |
|---|-----------|
| Miscellaneous presumptions . . . . .                                    | 425       |
| Relating to real estate . . . . .                                       | 426-7     |
| Founded on the relations in which parties stand to each other . . . . . | 428       |
| In contracts . . . . .  | 429       |
| Affecting common carriers . . . . .                                     | 430       |
| Affecting innkeepers . . . . .  | 430       |
| Maxim . . . . .   | 430       |

425. We now propose to advert to some presumptions likely to be met with in practice, which have not been hitherto noticed.

426. A large number of these relate to real estate, and are for the most part quasi præsumptiones juris, *i.e.* presumptions which are almost as obligatory as presumptions of law, but which can not be made without the intervention of a jury. Thus the soil of the seashore, between high and low water-mark, is presumed to belong to the crown; (b) and so is the soil at the bottom of a navigable tidal river. (c) So the shore of the sea or of a tidal river, between ordinary

(z) *M'Andrew v. Adames*, 4 M. & Scott, 517, 530, and the authorities there referred to, and *Arn. Ins.* 393 *et seq.*, 2nd Ed.

(a) *De Wolf v. Archangel Insurance Company*, L. Rep., 9 Q. B. 451.

(b) *Blundell v. Catterall*, 5 B. & A. 268, 304, per Bayley, J. See the *Att.-Gen. v. Chambers*, 4 De G., M. & G. 206; 5 Jur., N. S. 745.

(c) *Malcolmson v. O'Dea*, 10 Ho. Lo. Cas. 593, 618.

high and low water-mark, it presumed to be extra-parochial. (*d*) Whether the soil of lakes *prima facie* belongs to the owners of the lands or manors on either side, *ad medium filum aquæ*, or to the crown, seems a disputed point. (*e*) Where the river is not navigable, the bed is presumed to be the property of the owners on each side, *ad medium filum aquæ*. (*f*) The same principle holds in the case of a public highway,—the soil of which is taken, *prima facie*, to belong to the owners of the adjoining lands, *usque ad medium filum viæ*; (*g*) and it also applies to the case of a private road. (*h*) But, as this presumption is founded on the supposition that the road originally passed over the lands of adjoining owners, it seems that it does not apply to roads set out under inclosure acts, (*i*) or to cases where the original dedication of the road can be shown by positive evidence. (*k*) And, in the case of a private road, it may be rebutted by proof of acts of ownership. (*l*) Again, it seems to be a *presumptio juris* that one part of a manor is not of a different nature from the rest. (*m*) So the lord of a manor is, *prima facie*, entitled to all

(*d*) *Ipswich Dock Commissioners v. Overseers of St. Peter's, Ipswich*, 7 B. & S. 310; *Bridgwater Trustees v. Booth*, *Id.* 348; L. Rep., 2 Q. B. 4.

(*e*) *Marshall v. The Ulleswater Steam Navigation Company*, 3 B. & S. 732; affirmed in error, 6 B. & S. 570.

(*f*) *Carter v. Murcot*, 4 Burr. 2162; *R. v. The Inhabitants of Landulph*, 1 Moo. & R. 393; *Lord v. The Commissioners of Sidney*, 12 Moo. P. C. C. 473; *M'Cannon v. Sinclair*, 2 E. & E. 53.

(*g*) *Berry and Goodman's Case*, 2 Leon. 148; *Grose v. West*, 7 Taunt. 39; *Anon., Lofft*, 358; *Cooke v.*

*Green*, 11 Price, 739; *Salisbury (Marquis of) v. The Great Northern Railway Company*, 5 Jur., N. S. 70; *Berridge v. Ward*, 10 C. B., N. S. 400; *R. v. The Strand Board of Works*, 4 B. & S. 526.

(*h*) *Holmes v. Bellingham*, 7 C. B., N. S. 329.

(*i*) *R. v. The Inhabitants of Edmonton*, 1 M. & Rob 24, 32; *R. v. Wright*, 3 B. & Ad. 681.

(*k*) *Headlam v. Headley*, Holt, N. P. C. 463.

(*l*) See *Holmes v. Bellingham*, 7 C. B., N. S. 329, 337.

(*m*) *Co. Litt.* 78b.

the waste lands within the manor; (*n*) but the presumption may be rebutted by circumstances. (*o*) Strips of land adjoining a road are presumed to belong to the owner of the adjoining inclosed land, and not to the lord of the manor; (*p*) although this presumption also may be rebutted; (*q*) and is either done away, or considerably narrowed, by proof that those strips communicated with open commons, or larger portions of land. (*r*) Where an inclosure is bounded by a bank and ditch, the land which constitutes the ditch, is *prima facie* part of the close, although it be on the outside of the bank. (*s*) And in the case of party-walls, where the quantity of land contributed by each owner is unknown, the common use of the wall is *prima facie* evidence, that it and the land on which it is built are the undivided property of both. (*t*)

427. Where the terms of the grant of the several fishery are unknown, the owner of the fishery may be presumed to be the owner of the soil; (*u*) but where those terms appear, and are such as to convey an incorporeal hereditament only, the presumption is destroyed. (*v*) And ownership of the soil is *prima facie* evidence of a right of fishery. (*w*) Proof of a carriage-

(*n*) *Doe d. Earl of Dunraven v. Williams*, 7 C. & P. 332.

(*o*) *Simpson v. Dendy*, 8 C. B., N. S. 433.

(*p*) *Doe d. Pring v. Pearsey*, 7 B. & C. 304; *Steel v. Prickett*, 2 Stark. 463; *Scoones v. Morrell*, 1 Beav. 251; *Doe d. Barrett v. Kemp*, 7 Bing. 332.

(*q*) *Doe d. Harrison v. Hampson*, 4 C. P. 267.

(*r*) *Grose v. West*, 7 Taunt. 39.

(*s*) See, per Holroyd, J., *Doe d. Pring v. Pearsey*, 7 B. & C. 304, 307; per Lawrence, J., *Vowles v. Miller*, 3 Taunt. 137, 138.

(*t*) *Wiltshire v. Sidford*, 8 B. & C. 259, n.; *Cubitt v. Porter*, Id. 257.

(*u*) *Duke of Somerset v. Fogwell*, 5 B. & C. 875, 886, per Bayley, J.; *Holford v. Bailey*, 8 Q. B. 1000, 1016, per Lord Denman, Id., in error, 13 Q. B. 426, 444, per Parke, B. See also *Marshall v. The Ulleswater Steam Navigation Company*, 3 B. & S. 732; affirmed, 6 Id. 570; and Co. Litt. 122b, with Hargrave's note (7).

(*v*) *Duke of Somerset v. Fogwell*, 5 B. & C. 875.

(*w*) See Mayor, &c. of Carlisle v. Graham, L. Rep., 4 Ex. 361, 368; 3 Stark. Ev. 1253, 3rd Ed.

way is presumptive evidence of a grant of a driftway. (x) Where rents of small amount have been paid to the lord of the manor for a long series of years, without any variation, the payment of them affords no evidence of title to the land—the presumption is, that they are quit-rents. (y) So an allegation of seizin *prima facie* implies occupation. (z)

428. Several presumptions are founded on the relations in which parties stand to each other. Thus, a woman who commits felony, or perhaps misdemeanor, in company with her husband, is excused on the presumption (which, however, may be rebutted) of her having acted under his coercion. (a)<sup>1</sup> But the rule does not extend to crimes which are *mala in se*,<sup>2</sup> nor to such as are heinous in their character, or dangerous in their consequences. (b)<sup>3</sup> Encroachments made by

(x) *Ballard v. Dyson*, 1 Taunt. 179.

*England v. Wall*, 10 M. & W. 699.

(y) *Doe d. Whittick, v. Johnson*.  
Gow. N. P. C. 173–174, per Holroyd,  
J.

(a) See the authorities collected in  
Arch. Crim. Plead. pp. 18, 19, 15th  
Ed.; Roscoe's Cr. Evid. 937–939, 5th  
Ed.

(z) *Stott v. Stott*, 16 East, 351. See  
*Clayton v. Corby*, 2 G. & Dav. 174;

(b) *Id.*

<sup>1</sup> *Commonwealth v. Butler*, 1 Allen (Mass.) 4.

<sup>2</sup> That is, a felony less than murder. Wharton's American Criminal Law, § 71; *Davis v. State*, 15 Ohio, 72.

<sup>3</sup> *Commonwealth v. Neal*, 10 Mass. 152; *Jones v. State*, 5 Blackford 141, 192; *Commonwealth v. Trimmer*, 1 Mass. 476; *Martin v. Commonwealth*, 1 Id. 347. "The *prima facie* presumption on the trial is that the wife acted under the coercion of her husband, provided he were actually present when the felony were committed." If, therefore, nothing appear but that the felony was committed while they were both together, the jury ought to be directed to acquit the wife. Such presumption is, however, *prima facie* only, and may be rebutted, either by showing that the wife was the instigator or more active party, or that the husband, though present, was incapable of coercing, as that he was a cripple and bed-ridden, or that the wife was the stronger of the two. Wharton's American Criminal Law, § 73; *Commonwealth v. Trimmer*, 1 Mass

a tenant are considered as annexed to his holding, unless it appears clearly that he intended them for his own benefit, and not to hold them as he held the farm to which they are adjacent. (c) It is also a maxim, "In præsumptione legis, judicium redditur in invitum." (d)<sup>1</sup>

429. In the case of contracts between individuals, there are many presumptions of law based on policy and general convenience. Thus, it is a conclusive presumption of law, that an instrument under seal has been given for consideration;<sup>2</sup> and this presumption

(c) *Doe d. Lewis v. Rees*, 5 C. & P. 610; *Doe d. The Earl of Dunraven v. Williams*, 7 C. & P. 332; *Andrews v. Hailes*, 2 E. & B. 349; *Doe d. Croft v. Tidbury*, 14 C. B. 304; *Kingsmill v. Millard*, 11 Exch. 313; *Earl of Lisburne v. Davies*, L. Rep., 1 C. P. 259. (d) *Co. Litt.* 248b; 5 Co. 28b; 10 Co. 94b. See *infra*, chap. 9,

476; *State v. Parkerson*, 1 Strobb. 169; *Commonwealth v. Neal*, 10 Mass. 152.

<sup>1</sup> Judgment, in presumption of law, is given against the party contrary to his own inclination.

<sup>2</sup> So in the case of contracts, the contract will be presumed to be a legal one; *Dykers v. Townshend*, 24 N. Y. 57; or if one legal in one place, and illegal in another, it will be presumed to be legal according to the law of the place where it is made; *Brown v. Freeland*, 34 Miss. 181; or where servants are hired by one of several part-owners, they will be presumed to be hired by them all; *McMahon v. Davidson*, 12 Min. 357. And see as to peculiar presumptions in the case of certain contracts, *Emmonds v. Oldham*, 12 Tex. 18; *Grimke v. Grimke*, 1 Desaus. 366; *Erb v. Erb*, 50 Pa. St. 388; *Bailey v. Clayton*, 20 Id. 295 (as to when a ratification of a contract will be inferred); *Wilcox v. Wilcox*, 48 Barb. 327; *King v. Kelly*, 28 Ind. 89 (where it was held that the law would not presume a contract to pay board between members of one family); *Therriott v. Bagioli*, 9 Bosw. 578 (which held that, in an action to recover of a husband the price of goods furnished to a wife, the burden of proving them necessities was on the plaintiff); *Church v. Fagin*, 43 Mo. 123; *Fox v. Hilliard*, 35 Miss. 160; *Cummings v. Stone*, 13 Mich. 70; *Mandeville v. Welch*, 5 Wheat. 277; *Coburn v. Odell*, 30 N. H. (10 Fost.) 540; *Shoonmaker v. Roosa*, 17 Johns. 301; *Greer v. George*, 8



can only be removed by impeaching the instrument for fraud. (*e*)<sup>1</sup> But there is a remarkable exception to this rule, viz., where an instrument under seal operates in restraint of trade, in which case a real consideration must appear. (*f*) So, although in the case of contracts not under seal, a consideration is not, in general, presumed, (*g*) it is otherwise in the case of bills of exchange and promissory notes. (*h*)<sup>2</sup>

**430.** Where goods entrusted to a common carrier, to be carried for reward, are lost otherwise than by the act of God or the Queen's enemies, it is a *præsumptio juris et de jure* that they were lost by negligence, fraud, or connivance on his part. (*i*)<sup>3</sup> By the act of

(*e*) Bk. 2, pt. 3. § 220.

(*h*) *Supra*, sect. 1, sub-sect. 1, §

(*f*) See Chitty on Con. 9th Ed. 314.

619, where most of the cases are referred to.

(*i*) Bull. N. P. 70, n. (*a*); Palmer v.

The Grand Junction Railway Company, 4 M. & W. 749.

(*g*) Rann v. Hughes, 7 T. R. 350, note.

Ark. 131; Phelps v. Younger, 4 Ind. 450; Prior v. Coulter, 1 Bail. (S. C.) 517; Horn v. Fuller, 6 N. H. 511.

<sup>1</sup> Wearse v. Pierce, 24 Pick. 14; Dickinson v. Lewis, 34 Ala. 638.

<sup>2</sup> And see *ante*, note 1, p. 718.

<sup>3</sup> Herring v. Wilmington, &c. R. R. Co., 10 Ired. (N. C. Law) 402; Steamer Niagara v. Cordes, 21 How. (U. S.) 7; Shaw v. Gardner, 12 Gray (Mass.) 488; Mitchel v. Western, &c. R. R. Co., 30 Ga. 22; Illinois, &c. R. R. Co. v. Cowles, 32 Ill. 116; St. John v. Eastern R. R. Co., 1 Allen, 554; Bufft v. Troy, &c. R. R. Co., 36 Barb. 420; Booman v. American Express Co., 21 Wis. 152; Stroher v. Detroit, &c. R. R. Co., Id. 554; Ellis v. Portsmouth, &c. R. Co., 2 Ired. (Law) 138. "If the plaintiff proves that he has been injured by an act of the defendant of such a nature, that in similar cases, where due care has been taken, no injury is known to ensue, he raises a presumption against the defendant, which the latter must overcome by evidence, either of his carefulness in the performance of the act, or of some unusual circumstances, which makes it at least as probable that the injury was caused by some circumstance with which he had nothing to do, as by his negligence." Shearman and Redfield on Negligence, § 13. It was held in

God is meant storms, lightning, floods, earthquakes, and such other events as can not happen by the intervention of man; (*j*) and under the heads of the Queen's enemies must be understood public enemies, with whom the nation is at open war; (*k*) so that robbery by a mob, irresistible from their number, would be no excuse for the bailee. (*l*) This is an extremely severe presumption, but one which public policy appears to require; although both by the common law, and by virtue of various modern statutes, common carriers can, in many cases, limit their liability. (*m*) So, in the case of inn-keepers, before the 26 & 27 Vict. c. 41,—which has considerably modified their liability,—where the goods of a traveler brought into an inn were lost, it was presumed to be through negligence in the inn-keeper; and the law cast on him the onus of rebutting this presumption. (*n*) “Rigorous as this law may seem,” says Sir William Jones, (*o*) “and hard as it may actually be in one or two particular instances, it is founded on the great principle of public utility, to which all private considerations

(*j*) Bull. N. P. 70, n. (*a*).

(*k*) Story, Bailm. § 489, 5th Ed.

(*l*) *Coggs v. Bernard*, 2 L. Raym. 909, 918, per Holt, C. J.

(*m*) See 11 Geo. 4 & 1 Will. 4, c. 68; 17 & 18 Vict. c. 31; and Chitty on Cont. 9th Ed, 349, 458–465.

(*n*) Chitty on Cont. 9th Ed. 441;

Story, Bailm. §§ 472, 473, 5th Ed.

*Armistead v. Wilde*, 17 Q. B. 261; *Cashill v. Wright*, 6 E. & B. 891.

(*o*) Jones on Bailments, 95, 96, 4th Ed.

*Georgia R. R. Co. v. Willis*, 28 Geo. 317, that were a man's cattle were killed by a railroad train, and the agent of the company, when applied to for pay for the cattle, did not deny the company's liability, but offered to pay for them, and his offer was rejected as too small, and suit against the company brought, the onus of proving that the killing of the cattle was not the result of negligence was upon the company. Mr. Shearman, in a note to his valuable treatise on Negligence (p. 16), remarks: “This, however, seems to us an erroneous decision. If generally followed, it would discourage all compromises of suits, and thus promote needless litigation.”

ought to yield. For travelers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of inn-holders, whose education and morals are usually none of the best, and who might have frequent opportunities of associating with ruffians or pilferers, while the injured guest could seldom or never obtain legal proof of such combinations or even of their negligence, if no actual fraud had been committed by them." In this, as in many other instances of legal presumption, we may detect the application of the maxim "*Multa in jure communi contra rationem disputandi, pro communi utilitate introducta sunt.*" (*p*)<sup>1</sup>

(*p*) Co. Litt. 70b.

<sup>1</sup> "Many things have been introduced into the common law, with a view to the public good, which are inconsistent with sound reason." For examples see the very valuable treatise of Dr. Redfield, "*The Law of Carriers and of Bailments, Part V. The Law of Common Innkeepers, and Keepers of Stables in connection with Inns.*"

## SECTION III.

## PRESUMPTIONS AND PRESUMPTIVE EVIDENCE IN CRIMINAL LAW.

**431.** The subject of presumptions and presumptive evidence in criminal law, requires a separate consideration. In the present section we accordingly propose to treat,

1. Presumptions in criminal law.
2. Presumptive proof in criminal cases.
3. The principal forms of inculpatory presumptive evidence in criminal proceedings.

## SUB-SECTION I.

## PRESUMPTIONS IN CRIMINAL LAW.

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**432.** The introduction of legal presumptions into criminal jurisprudence, presents a question of some difficulty. Although no person ought to be condemned in a court of justice, unless the tribunal really and actually believes in his guilt; yet, even here, the principle of legal presumption may, with due discre-

tion, be advantageously resorted to, for the protection alike of the community and the accused. And accordingly we find, that not only are the general presumptions of law recognized in criminal jurisprudence, but that it has peculiar presumptions of its own. The universal presumption of acquaintance with the penal law, (*q*) and the maxim "res judicata pro veritate accipitur," (*r*) exist there in full force. Ignorance of any law which has been duly promulgated can not be pleaded in a criminal court; and a person who has once been tried for an offense, under circumstances where his safety was in jeopardy by the proceedings, can not, if acquitted, be tried again for that offense, whatever new arguments to prove his guilt may be discovered, or whatever fresh proofs of it may come to light.

433. A criminal intent is often presumed from acts which, morally speaking, are susceptible of but one interpretation. When for instance a party is proved to have laid poison for another, or to have deliberately struck him with a deadly weapon, or to have knowingly discharged loaded firearms at him, it would be absurd to require the prosecutor to show that he intended death or bodily harm to that person. So, where a baker delivered adulterated bread for the use of a public asylum, it was held unnecessary to allege that he intended it to be eaten, as the law would imply that from the delivery. (*s*)<sup>1</sup> The setting fire to a building is evidence of an intent to injure the owner, although no motive for the act be shown; (*t*) and the

(*q*) Introd. part 2, § 45, and *supra*, ch. 9.  
sect. 2, sub-sect. 1.

(*s*) R. v. Dixon, 3 Mau. & S. 11.

(*r*) Introd. part 2, § 44 and *infra*,

(*t*) R. v. Farrington, R. & R. 207.

<sup>1</sup> And see as to the presumption arising in the case of sale of diseased meat. *Seibright v. State*, 2 W. Va. 591.

uttering a forged document, is conclusive of an intent to defraud the person who would naturally be affected by it—an inference which is not removed, merely by that party swearing that he believes the accused had no such intention. (*u*)<sup>1</sup> So where a party deliberately publishes defamatory matter, malice will be presumed. (*v*)<sup>2</sup> In such cases *res ipsa in se dolum habet* (*x*)—the facts speak for themselves. Presumptions of this kind are so conformable to reason, that moral conviction and legal intendment are here in perfect harmony. But the safety of society, joined to the difficulty of proving psychological facts, (*v*) renders imperatively necessary a presumption which may seem severe; viz., that which casts on the accused, the onus of justifying or explaining certain acts which are *prima facie* illegal. It is partly on this principle that sanity is presumed in preference to innocence. (*z*)<sup>3</sup> So, a party who is

(*u*) *R. v. Sheppard*, R. & R. 169. See also *R. v. Mazagora*, Id. 291; *R. v. Nash*, 2 Den. C. C. 493. By 24 & 25 Vict. c. 98, s. 44, it is enacted, that "it shall be sufficient, in any indictment for forging, altering, uttering, offering, disposing of, or putting off any instrument whatsoever, where it shall be necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person; and on the trial of any such offense, it shall not be necessary to prove an intent to defraud any particular person, but it

shall be sufficient to prove that the party accused did the act charged with an intent to defraud."

(*v*) *Haire v. Wilson*, 9 B. & C. 643.

(*x*) *Bonnier, Traité des Preuves*, §§ 676, 677.

(*y*) "*Comen erudition est que l'entent d'un home ne serra trie, car le Diable n'ad conusance de l'entent de home*;" per *Brian, C. J.*, P. 17 *Edw. IV. 2 A. pl. 2*. See, however, that case.

(*z*) 2 *Ev. Poth.* 332; *Answer of the Judges to the house of Lords*, 8 *Scott, N. R.* 595, 601; 1 *Car. & K.* 134, 135. See *supra*, sect. 1, sub-sect. 3, § 332.

<sup>1</sup> An affidavit of forgery devolves upon the claimant under the deed the burden of proving its proper execution, if there be no subscribing witness. *Willis v. Lewis*, 28 *Tex.* 185.

<sup>2</sup> See *Morgan's Law of Literature*, vol. 1, ch. 2, of *Libel*, *passim*.

<sup>3</sup> *Ante*, note 1, p. 567; and see *Wharton on Homicide*, § 665. The rule as to conflicting presumptions

proved to have killed another, is presumed in the first instance to have done it maliciously, or at least unjustifiably ; and, consequently, all circumstances of justi-

of innocence and sanity is not always administered uniformly. Says Wharton on Homicide, § 668: "The conflict which has been just noticed has arisen from the habit of viewing the plea of insanity as an ordinary defense of the nature of confession and avoidance. Such, however, is not the case. It is rather in the nature of a plea to the jurisdiction, or a motion to change the venue. The defendant, through his counsel and friends, comes in and says that he is not amenable to penal jurisdiction. He is not a moral agent; he is insane; he is not the object of penal discipline. Such a plea, as is elsewhere argued, may be regarded, when it is set up for the purpose of showing entire unamenability to penal process, as a purely extrinsic application, to be made out by a preponderance of proof. Otherwise the law approaches those charged with crime as a wolf in sheep's clothing. To hold that a reasonable doubt as to a defendant's sanity should require his permanent imprisonment as a dangerous lunatic, would be to turn a maxim, apparently benignant, into an instrument of gross oppression. A man is tried for an assault. The jury have a reasonable doubt of his sanity, and find him, under the statutes, a dangerous lunatic; and this is a necessary consequence of the doctrine here criticised. Yet from such a consequence we revolt. To extinguish a man's civil existence,—to place him under close confinement for life,—to deprive him of the control of his estate, and of access to his family, something more than reasonable doubt should be required. For so total an extinction, not only of liberty but of civil and social capacity, we should at least exact a preponderance of proof. The difficulty is attributable to the fact that most cases in which insanity comes up as a defense are those of murder; and to be decreed to be *civilter mortuus*, and to be imprisoned as a dangerous lunatic, is better than to be hung. But the principle we are here discussing applies to all criminal prosecutions; and if a reasonable doubt as to sanity requires a verdict of dangerous lunacy, under the statutes, in a homicide case, it requires such a verdict in a case of assault. If in the former case the court must instruct the jury to give a verdict of dangerous lunacy if they have a reasonable doubt, the same instruction must be given in the latter case."

"But supposing insanity is set up, not for the purpose of

fication or extenuation are to be made out by the accused, unless they appear from the evidence adduced against him. (a)<sup>1</sup>

(a) *Fost. Cr. Law*, 255, 290. It may be a question, whether this presumption holds in cases of suicide, where the only fact established before a coroner's jury is, that the deceased put a period to his own existence, and there is no evidence as to the state of his mind at the time. The following reasons seem to show that the presumption does not apply in such cases: First, the *principle* fails. The presumption of malice from slaying is only a rebuttable presumption, adopted on the ground that, to call on a *living* person to justify a homicide, may be very advisable on grounds of public policy, and can work no hardship to the accused:—an argument wholly inapplicable to the case of a person who, being no more, can not be called on to justify or explain anything. Sec-

ondly, presumptions ought to be based on what usually and generally exists. In many, probably most cases of suicide, mental alienation, in some form or other, is present; in murder it is quite otherwise. Thirdly, the man who commits murder under the impression that he may do so with impunity, has only moral and religious feelings to subdue; he who destroys himself, has also to struggle against the primary law of nature—self-preservation. And lastly, there seems no good reason why the law should in this case lose sight of its own maxim, "*Nemo præsimitur esse immemor suæ æternæ salutis, et maximè in articulo mortis.*" 6 Co. 76a. The laws of some countries, we believe, have established it as a *præsumptio juris et de jure*, that all suicides are insane.<sup>2</sup>

transferring the defendant to the category of non-responsible agents, but for the purpose of meeting the allegation of malice in an indictment, does the same rule apply? Supposing, in other words, the defense is,—‘We do not say that the defendant is a maniac, or an idiot, who is to be put in custody as permanently and dangerously insane, and is to have

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<sup>1</sup> So, if a man points a gun at another, within shooting distance, the presumption is that the gun is loaded; and the burden is on the accused to prove that it was not loaded, and that he knew that it was not. *Caldwell v. State*, 5 Tex. 18.

<sup>2</sup> The great preponderance of the English authorities on the subject of “suicide” or “self-destruction,” is to the effect that the two terms are not synonymous, the term “suicide” being held to mean a “voluntary self-destruction,” such as would avoid, as being in fraud of, a policy of life insurance which bars “suicide;” while the other is the act itself, which may be superinduced by mental disease. All suicides not perpetrated “in the madness of delirium” are “voluntary



**434.** A criminal intent is sometimes transferred by law from one act to another, the maxim being, "In criminalibus sufficit generalis militia intentionis cum

his civil existence terminated; but we say that he is predisposed to insanity, and that when excited his reason is so swept away by the current of this insane tendency, that he is incapable of deliberate intent.' Are we here to concede that reasonable doubt as to the defendant's capacity in this respect is to acquit; or must we here also, in order to acquit, require that such incapacity should be made out by a preponderance of proof? Falling back on the reasoning heretofore expressed, we must hold that when a defendant is charged with a deliberate homicide, and he offers evidence to show that the condition of his mind was such (by reason of insane predisposition) that he was incapable at the time of deliberation; then, if the jury has a reasonable doubt as to such capacity, he is to be acquitted of the higher grade and convicted of the lower grade of the offense. And this is conceded even by those courts who hold that on the question of insanity, as an absolute bar, there must be a preponderance of proof. Indeed, when we examine the reasoning of the courts of Pennsylvania and Massachusetts in the group of

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suicides." *Cooper v. Massachusetts Mutual Life Insurance Company*, 102 Mass. 227. In the United States the decisions are unanimously to the effect that suicide not only raises no presumption of insanity, but that one taking his own life is presumed to do so in his right mind. In *St. Louis Mutual Ins. Co. v. Graves*, 6 Bush. (Ky.) 268, the court was equally divided whether the act of self-killing was induced by moral insanity or not, but that case does not disturb the presumption as above stated, which will be found declared in *Terry v. Insurance Co.*, 1 Dill. 403; *Breasted v. Farmers' Loan, &c. Co.*, 4 Hill, N. Y. 78; S. C., 8 N. Y. 299; *Eastbrook v. Union, &c. Co.*, 54 Me. 224; *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 86, 466; *Dean v. Am. Mut. Ins. Co.*, 4 Allen, 96; S. C. with note, 1 Big. Ins. Rep. 195; *Cooper v. Mass. &c. Ins. Co.*, 102 Mass. 227; *Nimick v. Ins. Co.*, 1 Big. Ins. Rep. 689; *Grayham v. Commonwealth*, 16 B. Mon. 587; *Kriel v. Commonwealth*, 5 Bush. (Ky.) 362; *Mutual Life Ins. Co. v. Terry*, 2 Ins. Law Journal, 571; *Van Zandt v. Mutual Benefit Ins. Co.*, 55 N. Y. 169; *Gay v. Union, &c. Ins. Co.*, 9 Blatchf. 143; *Equitable Life Ins. Co. v. Patterson*, 41 Ga. 338; *Mallory v*

facto paris gradus." (δ) A., maliciously discharging a gun at B., kills C.; A. is guilty of murder, for the malice is transferred from B. to C. (c) And the same

(δ) Bacon, Max, Law, Reg. 15. See (c) 1 East, P. C. 230; R. v. Smith, 1 also 3 Inst. 51. Dears. C. C. 559.

cases which relate to the question of reasonable doubt, we find that the distinction here expressed lies at the basis of their adjudications. To find a defendant irresponsible requires a preponderance of proof. But whenever there are various grades in an offense, then a reasonable doubt as to whether the higher grade exists requires a finding for the lower grade. And whenever intent is a necessary constituent of the offense, then a reasonable doubt as to intent requires an acquittal. If there be a logical inconsistency in the views just expressed, such inconsistency must be defended by an appeal to the maxim *in dubio mitius*. If, on an indictment for an assault, insanity is suspected by the jury, and if a verdict of insanity would subject the defendant to far more rigorous penalties than a conviction of assault, then there can be no verdict of insanity, simply because of a reasonable doubt of sanity. On the other hand, on an indictment for murder, where a conviction would impose severer penalties than a verdict of insanity, doubts must tell in favor of the more benignant application of the law."

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Travelers' Ins. Co., 1 Insurance Law Journal, 891; American Life Ins. Co. v. Isett, 2 Id. 893; Coneston v. Connecticut Mutual Ins. Co., 3 Id. 13; McClure v. Mutual Life Ins. Co., Id. 246; Pierce v. Travelers' Ins. Co., Id. 404; Jacobs v. National Ins. Co. of U. S., 4 Id. 327; Knickerbocker Ins. Co. v. Peters, Id. 414; Chapman v. Republic Life Ins. Co., Id. 488; Knickerbocker Life Ins. Co. v. Peters, Central Law Journal, October 8, 1875.

"The presumption of law in all cases of death is, that it was caused by accident, as in drowning, poisoning, &c., or in the natural way, when no cause of death can be discovered. 47 N. Y. 52. The burden of proving that the insured died by his own hand, is on the insurer. This proved, the burden is then thrown on the representatives of the insured, to show that he was insane at the time, and did not commit the act of self-destruction with the knowledge that it would, and the intent that it should, result in death. A person is presumed to be sane, and to know the consequences of his acts, until

holds where poison laid by A. for B., is accidentally taken by C. (*d*)<sup>1</sup> It is on this principle, that a party who accidentally kills himself in the attempt to murder another, is deemed *felo de se*. (*e*)

(*d*) Plowd. 474; 1 East, P. C. 230.

(*e*) 1 Hale, P. C. 413; 1 East, P. C. 230.

<sup>1</sup> See Wharton on Homicide, §§ 42-48. If A. having malice against B., strikes at and misses him, but kills C., this is murder in A., but if the blow had been without malice and under such circumstances, that if B. had died it would have been but manslaughter, the killing of C. would have been but manslaughter. *Id.*; *State v. Cooper*, 1 Green, N. J. 381; *State v. Benton*, 2 Dev. & Bat. 196; *State v. Fulkerson*, 1 Phil. (N. C.) L. 233; and see the circumstances varied in *Angel v. State*, 36 Tex. 542; *State v. Smith*, 2 Strobb. 77; *Bretton v. State*, 10 Humph. 103; *Morris v. Platt*, 32 Conn. 75. "Were the question still open," says Wharton (on Homicide, § 50), "then it would be both humane and philosophical to hold that, so far as concerns B., the person whom A. intends to kill, but does not actually kill, A. is guilty only of an attempt to kill. What A.'s offense is as to C., who is not seen

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the contrary appears. Suicide itself is not evidence of insanity." See authorities on all above points, in *Knickerbocker Life Ins. Co. v. Peters*, Maryland Court of Appeals, April Term, 1875, in *Central Law Journal*, Oct. 8, 1875.

A legal definition of suicide involves the deliberate termination of one's existence while in the possession and enjoyment of his mental faculties. Self-slaughter by an insane man or a lunatic is not an act of suicide within the meaning of the law. 4 Bl. Com. 189; 1 Hales, P. C. 411, 412. But is self-destruction entitled to the presumption of suicide, so generally accorded it? Is not the fact of self-killing so repugnant to a healthy or sane state of mind, so unexampled in cases of *mens sana in corpore sano* as to warrant the rule to be stated exactly the reverse of what it is now? There appears to be much to be said in favor of the latter view. Let us, then, without attempting an argument—but taking Juvenal's definition of perfect health—*i. e.*, a sound mind in a sound body—be allowed to submit a few considerations which are capable of being urged against the presumption of suicide in cases of self-destruction; 1st, as to a sound body. It will hardly be claimed that self-destruction is ever a purely

435. In some cases the law goes further, and attaches to acts criminal in themselves, a degree of guilt higher than that to which they are naturally entitled.

by A., but who accidentally interposes, and receives a fatal wound, depends upon whether the shooting was of such a character (*e. g.*, from the place of firing being one in which persons are accustomed to pass) as implies negligence in A. If so, then the killing of C. is manslaughter. But as A. did not intend to kill C., then the killing of C. is not, under such circumstances, murder. That the intent to kill B., and the actual killing of C., can not be lumped so as to make an offense, is illustrated by the fact that supposing B. to have been killed, and the shot to have pierced him and then killed C., then the killing of B. and C. are distinct offenses, to be separately tried. *Vaughan v. Com.*, 2 Va. Ca. 273; *State v. Benham*, 7 Conn. 414; *State v. Standifer*, 5 Porter, 523; *People v. Warren*, 1 Parker C. R.

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animal impulse. If we except the scorpion, which reptile, it is said, will sting itself to death, when surrounded by inevitable destruction, man is the only being in animal life, that ever attempts self-destruction. But this act on the part of the scorpion, certainly shows a reasoning power, a knowledge of its own impending destruction, and of the fact that no avenue of escape is open to it, which would lead us to hesitate in pronouncing it a purely animal or physical act. The suicide of the scorpion, then, being deliberate, the presumption is against its insanity. But, even if it were not, no argument can be drawn from a single exception. If the instinct of self-preservation in every animate thing is the strongest possible instinct it possesses, it would at least seem difficult to reconcile the fact with a presumption that, if one died by his own hand, over which he had complete mental control, he died willingly. If not a purely animal act, the self-destruction must be superinduced by mental condition. For the opinion that men, in their sane minds, ever commit self-destruction, it is necessary to search backward in the history of suicide. The earliest cases of suicide would seem, at first, to have been the result of pure deliberation and of anything but insanity, but a contrary view of the circumstances is far from impossible. The two earliest cases are those of Saul and his armor-bearer (1 Sam. xxxi.), but the former, although apparently the result of an instinct like the

It was on this principle that the entering into measures for deposing or imprisoning the king, was held to be an overt act of compassing his death. (*f*) So

(*f*) Fost. Cr. Law, 195-6.

scorpion's, whose last hope of physical safety has disappeared, might not unnaturally have been the result of despair, and mental agony, which arising from the continual denunciations he had received from the prophet, until, forsaken of God (1 Sam. ch. xxviii.), and having received his final doom from Samuel in the witches' cave—coupled with the death which he saw approaching—might well have driven any man insane. We have only the bare record of the servant's act, but the master's desperation and mania may, not unnaturally, have communicated itself to his constant attendant, and rendered him melancholy and tired of life, which is a form of insanity at least. The death of Samson, if a suicide at all (though we have no record that it was—and the presumption of the instinct of self-preservation and love of life, even in a blind and bound old man (Judges, xvi. 30), is against the idea—would come nearer to an instance of sane deliberation than either. Besides which, we must remember that there was no penalty in the mosaic law against suicide, or no discouragement of such an act, though Josephus says, that it was the custom in Judea to leave the bodies of those dying by their own hands, unburied till after sunset. In considering the suicides of Themistocles, Demosthenes, Hannibal, and Cato of Utica, we must remember that, without faith in a future state of retribution, these historic men are represented as preferring, after rational calculation, annihilation to hopeless torture or degradation;" but what is a state of abject hopelessness, a state in which the attribute of hope, the nearest and most vital attribute of mental life, is entirely wanting, but a state of melancholia, which is insanity? Pythagoras held that no man had the right to leave his post without an order from his commander, but other philosophers reasoned that, as man's life was his own, he could dispose of it as he pleased. The Stoics, the disciples of Zeno, taught that suicide, under certain circumstances, was right; that as man had nothing to fear after death, he was at liberty to take his own life whenever it became irksome to him. Nay more, under certain circumstances, they even prescribed it as a duty. Seneca, Epist. 70.

But the same remark may be made in this case, namely, that a state of utter hopelessness is only a species of mental

if a man, without justification, assaults another with the intention of giving him only a slight beating, and death ensues, he is held to be guilty of homicide. (g)<sup>1</sup>

(g) 4 Blackst. C. 200.

<sup>1</sup> And so where a correction, administered by one having lawful authority, exceeds the bounds of due moderation, and death ensues, it may be either murder or manslaughter according to the circumstances. Wharton on Homicide, § 165; see *State v. Harris*, 63 N. C. 1. So in *United States v. Freeman*, it was said that if a seaman is in a state of great debility and exhaustion, so that he can not go aloft without danger of death or enormous bodily injury, and the facts are known to the master, who notwithstanding compels the seaman, by moral or physical force, to go aloft, persisting with brutal malignity in such course, and the seaman falls from the mast, and is drowned thereby, it is murder in the master, but if there be no malice in the master, is manslaughter. As to excessive punishment by a schoolmaster; *Com. v. Randall*, 4 Gray (Mass.) 36. So death in consequence of a practical joke—*e. g.*, as by shooting off a gun to frighten a person (*State v. Roane*, 2 Dev. 58), will be manslaughter. Wharton on Crimes, § 164.

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insanity, since hope is a mental attribute, and a mind lacking any one of its attributes, is just as much insane (that is, non-sane), as a body lacking any one of its physical attributes of sensation. Let us now look at those historical periods when the fashion of self-destruction has been prevalent. In some parts of India, (we condense from a valuable paper read before the Medico-Legal Society of the city of New York, in September, 1875, by R. S. Guernsey, Esq., of the New York bar, entitled, "The Penal Laws relating to Suicide in Ancient and in Modern Times," in which the author comprehensively treated of the subject in its legal, social, moral, and religious aspects) suicide was once considered meritorious, but the self-immolation of widows on the funeral pyres of their husbands is no longer permitted. In China, suicide is by no means uncommon, and no disgrace attaches to the victim of his own violence, or to his family. In Japan, suicides are frequent, and the taking of one's life is often looked upon as meritorious. When an official has failed in the performance of his duty, he has the privilege of performing *hari-kari*, or disembowelling himself, to save him the disgrace of dying by

And if several persons go out with the intention of committing a felony, and in the prosecution of the general design one of them commits any other felony, all are accountable for it. (*h*)

(*h*) 1 Hale, P. C. 439.

the hand of the executioner. If he avails himself of the privilege, his property is saved from forfeiture and his family from dishonor. In some countries the act of suicide is looked upon as heroic, and frequently the sons of the self-murderer are rewarded for the courage of their father, with important appointments and promotions.

Egesius was said to be so eloquent in praise of death that hundreds who heard him made away with themselves, and suicide became epidemic, until Ptolemy, alarmed at the spread of the infatuation, ordered Egesius away from Alexandria, and the people at once came to their senses.

At one time in France poison was furnished to all who could give satisfactory proof that it was better for them to die than to live. A cobbler, who had determined to kill himself, thought he would do it with *éclat*; so, having prepared his poison, he began a letter which was to be read after his death, and to be talked of throughout the province. He started off with a quotation, and continued, "Thus says Molière," but fearing that he had erred in attributing the remark to Molière, he took down his favorite author and began to read. After an hour's pleasant communion with the great writer, he put the poison away and went to work at his last.

The Milesian virgins once became afflicted with the insane notion that they should commit suicide, and many of them obeyed the impulse. A law was passed ordaining that the body of the suicide should be dragged naked through the streets, and this effectually dispelled the illusion. Some of the Roman jurists said that suicide was a felony, unless permitted by the emperor. Under one emperor the soldiers were set to ditching and making sewers. Mortified at what they looked upon as an ignominy, many of them committed suicide. Under another a soldier attempting suicide was treated as a deserter, until Domitian decreed that the suicide of an accused person should entail upon him the dishonor that would have attached to him had his crime been proved.

The Indians of South America, when oppressed beyond endurance by their Spanish conquerors, made away with themselves in great numbers. They were checked only by being

436. The presumptions in the two preceding articles, are particular cases of the maxim "*Qui semel malus, semper præsumitur esse malus eodem genere,*"

told that if they did not desist from the practice, their masters would commit suicide too, and follow them into the next world, where their toils and torments should be increased tenfold. This threat had the desired effect. There is little suicide among the North American Indians. It is only the squaws who kill themselves. They always do this by hanging to a tree, and invariably select the smallest tree that will answer the purpose, believing that, in the next world, they will be obliged to drag the tree about with them forever.

Among the early Christians there was an ardent longing for martyrdom, and, under the influence of Tertullian's saying, "*The blood of the martyrs is the seed of the church,*" numbers of them fell victims to their religious fanaticism. To such an extent was the frenzy carried, that a Bishops' Council, in the fifth century, decreed that suicide was the effect of diabolical influence, and thereafter the church treated it as a sin, and the body of the self-murderer was buried without the sacred rites.

But all these were epochs of the prevalence of a sort of insanity, which, like the insanity of witchcraft, had its day and died out. And the various forms of penalties enacted from time to time, in every case seeking to attach some moral punishment to the crime—which should survive the memory of the suicide—would seem to show that the act was the act of a mental hallucination, not to be overcome by the ordinary methods. In the time of Louis IX. of France the body of the suicide was subjected to the grossest indignities. It was taken from the house through an opening made for the purpose, was horribly mutilated, and buried at night. No mass was allowed for the soul of the dead man, but the charitably disposed were kindly permitted to pray for its repose, if they felt inclined.

The Roman Catholics, the Greeks, and Protestant Episcopal churches prohibit the reading of the burial service over the body of the suicide, except in the case of one who died while insane. The statute law of England prohibits it in all cases. At the time of the Reformation in England, the suicide's property was confiscated to compensate the State for the loss of a subject, his body was buried at the cross-roads and a stake was driven through it, to mark the detestation of



(i) another instance of which has been already given.

(k) But the foregoing applications of it, especially the second, have been attacked by some modern wri-

(i) Cro. Car. 317.

(k) *Supra*, sect. 2, sub-sect. 8, § 413.

the law, and to deter others from the crime. This very ancient rule fell into general, if not entire disuse many years ago, but it was not repealed until the fourth year of George IV.'s reign, and even then, to manifest the horror of the law at the act of suicide, it was ordered that the body, which might be placed in a churchyard, or other consecrated ground, should be buried at night, and without the performance of religious rites.

Mahomet in the Koran forbids suicide expressly and with peculiar unction. The Canon Law enacted that suicide or attempted suicide were infamous, and, so far as possible, to be punished, upon the grounds of public policy as well as of morality. "For there could be no patient endurance in the state if there were no patient endurance in the citizen. If the people should resort to suicide to escape trouble, so would the state, and all social order would be at an end." The principle was adopted by the Germanic Law, and accepted by the ecclesiastical courts of England, while it is undoubtedly part of the common law of the United States, so much of the ecclesiastical law of England as consisted of ethical principle, having been incorporated into the common law of the United States. Wharton on Homicide, § 315, note. In Lord MACAULAY's report on the Indian Code, he says:

"Our reasons for not punishing it (aiding another to commit suicide) so severely as murder, are these: In the first place, the motives which prompt men to the commission of this offense are generally far more respectable than those which prompt men to the commission of murder. Sometimes it is the effect of a strong sense of religious duty, sometimes of a strong sense of honor, not unfrequently of humanity. The soldier who, at the entreaty of a wounded comrade, puts the comrade out of pain; the friend who supplies laudanum to a person suffering the torment of a lingering disease; the freedman who, in ancient times, held out the sword that his master might fall on it; the high-born native of India who stabs the females of the family at their own entreaty, in order to save them from the licentiousness of a band of marauders, would, except in Christian societies, scarcely be thought cul-

ters as being repugnant to natural justice and humanity; (*l*) as well as to the passages of the Roman law, "In maleficiis voluntas spectatur, non exitus," (*m*)

(*l*) Benth. Jud. Ev. bk. 5, ch. 4; Jurisprudence, 43.  
 Phillimore, Principles and Maxims of (*m*) Dig. lib. 48, tit. 8. l. 14.

pable, and even in Christian societies would not be regarded by the public, and ought not to be treated by the law, as assassins.

"Again, this crime is by no means productive of so much evil to the community as murder. One evil ingredient, of the utmost importance, is altogether wanting to the offense of voluntary culpable homicide by consent. It does not produce general insecurity. It does not spread terror through society. When we punish murder with such signal severity, we have two ends in view. One end is, that people may not be murdered. Another end is, that people may not live in constant dread of being murdered. This second end is perhaps the more important of the two. For if assassination were left unpunished, the number of persons assassinated would probably bear a very small proportion to the whole population; but the life of every human being would be passed in constant anxiety and alarm. This property of the offense of murder is not found in the offense of voluntary culpable homicide by consent. Every man who has not given his consent to be put to death is perfectly certain that this latter offense cannot at present be committed on him, and that it never will be committed unless he shall first be convinced that it is his interest to consent to it. We know that two or three midnight assassinations are sufficient to keep a city of a million inhabitants in a state of consternation during several weeks, and to cause every private family to lay in arms and watchmen's rattles. No number of suicides, or of homicides, committed with the unextorted consent of the person killed, could possibly produce such alarm among the survivors."

And see available collection of references to laws of different countries in regard to suicide, in Wharton on Homicide, § 315. In modern times the preventive policy of law is directed to any possible accessories of the act of suicide, rather than to any moral or sentimental appeal to the principles themselves. "When self-killing ceases to be entirely voluntary; in other words, when it is executed under another's compulsion,

"Fraudis interpretatio semper in jure civili, non ex eventu duntaxat, sed et consilio quoque desideratur."

(n) But it may well be doubted whether these pas-

(n) Dig. lib. 50, tit. 17, l. 79.

then, at common law, that other is guilty of homicide, though the deceased himself struck the fatal blow.

"Under the Anglo-Saxon laws, a person present at the death of a man who was murdered or had committed suicide was regarded as *particeps criminis*, and as such was liable to a fine. Every man's life had its value, called a *were* or *capitis estimatio*. This had been varied at different periods in the time of King Athelstan; in A. D. 926, a law was made to settle the *were* of every order of persons in the state. If the fines were not paid, the punishment was death.

"In some countries accessories to suicide are punishable, even though suicide itself is not a penal offense.

"Among the German States, Brunswick, Thuringia, Baden and Saxony alone punish those who are accessories to suicide. The penal code of France has no penalty against accessories in such cases. The penal code of India has a penalty for the accomplice or accessory.

"Under the New York Revised Statutes (2 R. S. 661, § 7), assisting another in committing self-murder is declared to be manslaughter in the first degree.

"At common law, if a man encourages another to murder himself, and he is present abetting him while he does so, such man is guilty of murder as principal. It is otherwise, however, at common law, when the suicide is consummated in the absence of the adviser. In such cases, as the adviser is only an accessory before the fact, he can not, according to the old technical rule of law, be convicted until after a conviction of the principal, who, being on this hypothesis dead, is out of the reach of legal process. This, however, has been in many of the states corrected by statute, and where it is not, the advising another to commit suicide, who afterwards does so, is indictable at common law as a misdemeanor" (and see *Commonwealth v. Bowen*, 13 Mass. 359; *Green v. State*, 13 Mo. 382).

And so a person using his power over another to induce him to commit suicide is responsible as for homicide, on the ground, that to force one to swallow poison by threats of violence, is an administering of poison. *Blackburn v. State*, 23 Ohio St. 146. *Wharton on Homicide*,

sages, standing as they do in the Digest without context, mean to express more than the unquestionable principle, that there can be no crime where there is no

§ 515, *et seq.* Since the consent of the deceased is no defense to an indictment for murder, as no one can by consent validate the taking of his own life. Says Wharton (on Homicide, § 320): "Suppose A. is assailed by a fatal disease for which the only escape is a dangerous surgical operation; and that this operation is skillfully performed by B. at A.'s request, but that A. dies under the knife? On this point, Lord MACAULAY, in his report on the India Penal Code, says: 'It is often the wisest thing a man can do to expose his life to great hazard. It is often the greatest service that can be rendered to him to do what may very probably cause his death. He may labor under a cruel and wasting malady which is certain to shorten his life, and which renders his life, while it lasts, useless to others and a torment to himself. Suppose that under these circumstances he, undeceived, gives his free and intelligent consent to take the risk of an operation which in a large proportion of cases has proved fatal, but which is the only method by which his disease can possibly be cured, and which, if it succeeds, will restore him to health and vigor. We do not conceive that it would be expedient to punish the surgeon who should perform the operation, though by performing it he might cause death, not intending to cause death, but knowing himself likely to cause it. Again, if a person attacked by a wild beast should call out to his friends to fire, though with imminent hazard to himself, and they were to obey the call, we do not conceive that it would be expedient to punish them, though they might by firing cause his death, and though when they fired they knew themselves to be likely to cause his death.' The same rule applies, as has been argued by Bar, an able German jurist, in cases where consent, on account of mental incapacity, can not be given. Suppose a dangerous operation is required as the last hope of resuscitating an unconscious person. If the operation is performed with the skill usual to surgeons under such circumstances, this is a good defense if death ensue."

But if we should accept the theory that self-destruction is in every case the result of unhealthy mental condition, of course it could not be a crime at all, at least in the legal sense which attaches a penalty to crimes. This is the view we understand Dr. Henry Maudsley to take of the matter, though we

criminal intention; or, as our own law has it, "*Actus non facit reum nisi mens sit rea.*" (o)<sup>1</sup> And, so far from being at variance with natural justice or human-

(o) Bk. I, pt. I, § 96.

are aware that that learned gentleman is charged with going to the extent of holding that no living person is actually sane, a doctrine which would destroy utterly any ideas of human responsibility for crime. Says Dr. Maudsley, "It is, indeed, from the gloomy depths of a mind in this melancholic state that desperate impulses to suicide or homicide often spring; and it is by persons in this state of mental suffering, that many of the suicides and some of the homicides which are recorded almost daily in the newspapers, are done." *Am. Ed.* p. 123.

"I do not forget that the lawyers have declared delusion to be the test of insanity, but that is a doctrine which, in common with other physicians who know anything of insanity. I do not hesitate to pronounce erroneous" (*Id.* p. 133). "The most anxious cases with which those have to do who are engaged in the care and treatment of the insane, are unquestionably those in which there is persistent suicidal impulse, it may be without appreciable disorder of the intellect. The patient is quite aware of his morbid state, deploras it, struggles against the horrible temptation, but, in the end, unless very closely watched, is hurried into suicide by it. Of course such a person is depressed because of his state, feels no interest in his usual pursuits, and can not follow them; everything is swallowed up in the absorbing misery of his temptation; but he is under no delusion; his intellect is clear; he can reason about his condition as well as any one else can; his knowledge of right and wrong, in regard to the act, is most keen. Nevertheless, his intellect is, at times, so completely the slave of his morbid impulse, that it is constrained to watch for opportunities, and to devise means to carry it into effect. No one who has not seen it could believe what ingenuity there may be in planning, and what determination in executing a deed which, all the while, is reprobated as most wicked. Many examples of this form of derangement might be quoted from writers on insanity. I shall content myself with mentioning two instances which came under my own observa-

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<sup>1</sup> An act does not make the doer of it guilty, unless the mind be guilty—*i. e.*, unless the intent be criminal.

ity, the maxim in question seems to be a principle of general jurisprudence, and is founded in true morality and policy. The principle is recognized in the laws of

tion. A married lady, thirty-one years of age—sprung from a family in which there was much insanity—was, a few weeks after her confinement, seized with a strong and persistent suicidal impulse, without delusion or disorder of the intellect. After some weeks of zealous attention and anxious care from her relatives, who were all most unwilling to send her from home, it was found absolutely necessary to send her to an asylum; so frequent, so cunningly devised, so determined were her suicidal attempts. On admission, she was very wretched because of the frightful impulse with which she was possessed, and often wept bitterly, deploring the great grief and trouble which she caused to her friends. She was quite rational, even in her horror and reprobation of the morbid propensity; all the fault that could be found with her intellect was, that it was enlisted in its service. Nevertheless, her attempts at suicide were unceasing. At times she would seem quite cheerful, so as to throw her attendants off their guard, and then would make, with quick and sudden energy, a pre-contrived attempt. On one occasion she secretly tore her night dress into strips while in bed, and was detected in the attempt to strangle herself with them. For some time she endeavored to starve herself to death by refusing all food, and it was necessary to feed her with the stomach-pump. The anxiety which she caused was almost intolerable, but no one could grieve more over her miserable state than she did herself. After she had been in the asylum for four months, there appeared to be a slow and steady improvement, and it was generally thought, as it was devoutly hoped, that she would make no more attempts at self-destruction. Watchfulness was somewhat relaxed, when, one night, she suddenly escaped out of a door which had carelessly been left unlocked, climbed over a high wall with surprising agility, and ran off to a reservoir of water, into which she threw herself headlong. She was rescued before life was quite extinct; and after this all but successful attempt she never made another, but gradually regained her cheerfulness and love of life, and finally left the establishment in her right mind. In face of this example of uncontrollable morbid impulse, with clear intellect and keen moral sense, what becomes of the legal criterion of responsibility? A gentleman of middle age and of

France (*p*) and Louisiana, (*q*) and, it is said, of China also; (*r*) and, in some cases at least, by the Roman law; (*s*) while the maxim in terms is found in the

(*p*) The following exposition of the French law on this subject may not be deemed misplaced: "Souvent la loi pénale conclut à priori, de l'existence de certains faits qui rendent le délit vraisemblable, à l'existence même du délit. Mais la légitimité d'une présomption aussi grave est subordonnée à deux conditions: 1<sup>o</sup>, que le fait constaté emporte certitude morale du fait incriminé par la loi; 2<sup>o</sup>, que le fait constaté soit lui-même imputable. Ces deux conditions se trouvent réunies dans le cas prévu par l'article 61 du Code pénal, qui punit, comme complices des malfaiteurs exerçant des violences contre la paix publique, ceux qui, connaissant leur conduite criminelle, leur fournissent habituellement une retraite. Le fait de loger habituellement les malfaiteurs, rend éminemment vraisemblable une coup-

able association. Ce fait est parfaitement imputable; la loi, en le frappant, ne fait qu'aggraver la pénalité d'un acte déjà répréhensible en lui-même. C'est là de la rigueur peut-être; mais ce n'est pas de l'iniquité. On peut justifier de même la disposition de la loi du 21 Brumaire, an v. (tit. III. art. 2), qui répute coupable de trahison tout militaire qui, en présence de l'ennemi, aura poussé des clameurs tendant à jeter l'épouvante et le désordre dans les rangs. La vraisemblance d'une intelligence criminelle avec l'ennemi, justifie l'application de la peine capitale à un fait qui, par lui-même, est déjà d'une extrême gravité:"

Bonnier, *Traité des Preuves*, § 674,

(*q*) *Crim. Code of Louisiana*, § 41.

(*r*) *Benth. Jud. Ev. bk. 5, ch. 4.*

(*s*) See *Dig. lib. 47, tit. 10, l. 18, §*

3.

ample means, happily married, but sprung from a family in which other members had been insane, and who before marriage had led a dissipated life and was now suffering from the enervating effects of his excesses, became the victim of desperate suicidal insanity. He had once before had a similar attack, from which he had recovered in a few months. On this occasion he was terribly distressed and depressed by reason of the impulse to destroy himself—there was no other cause of the depression—but, at the same time, he declared calmly that he must do it, and that he should have done it before this if he had not been a coward. To all attempts to comfort him by the assurance that it would pass away as it had done on a former occasion, he smiled incredulously, repeating the declaration that he must do it. He had been recommended to travel for change of scene, but as he had attempted to throw himself overboard while at sea, he was brought back home and placed under special care. He continued, however, in the same hopeless and despairing state of mind, protesting calmly that he must do it, that he was disgraced and dared not look people in the face because of his

canon law, (*t*) and is thus ably explained by one of the commentators upon it: “*Semel malus, semper præsumitur malus.*” *Regula videtur contraria chari-*

(*t*) *Sext. Decretal. lib. 5, tit. 12, de Reg. Jur. Reg. 8.*

cowardice in not doing it, and all this so quietly that it was hardly possible to think that he really meant what he said. Nevertheless, one morning he eluded the vigilance of his attendant, ran off as fast as he could across hedges and ditches, closely but vainly pursued, to a railway, clambered up a high embankment, and deliberately laid himself down across the rails, in front of a passing train, which killed him on the spot. Except that this unfortunate gentleman had the insane suicidal impulse, and thought himself a disgraced man, who could never again hold up his head because of his cowardice, he was, in all respects, apparently sane.” *Id.* pp. 133, 137.

The insurance company has of course the opportunity, before insuring, of examining for traces of peculiar or hereditary mental disease, as well as for physical disabilities, and death by “involuntary suicide” is nothing but death from the consequences of mental disease.

We have expressed a doubt as to whether Samson’s immolation (narrated in Judges xvi. 29) was suicide. If it were, then, perhaps, his self-destruction, and that of Thomas Chatterton are the two most nearly perfect examples of calculating and deliberate suicide. Chatterton, as we find in his poems, was no stranger to the possible finale of suicide in his own case. We find him writing in 1769:

“Since we can die but once, what matters it  
If rope or garter, pistol, poison, sword,  
Slow-wasting sickness, or the sudden burst  
Of valve arterial in the noble parts,  
Curtail the miseries of human life,” etc.

While he concludes his “last verses,” which he wrote and dated on the day of his death, Friday, August 24th, 1770, and inserted in his pocketbook:

“Have mercy, Heaven, when here I cease to live,  
And this last act of wretchedness forgive,”—

after which he tears up his manuscript, stretches himself upon his couch and takes the arsenic and water which works his death. Previously to this, “between 11 and 2 o'clock, Saturday in the utmost distress of mind,” April 14, 1770, before he left Bristol, he had contemplated suicide, and left “direc-



tati, quæ non cogitet malum; sed non est. Non enim charitatis est malum non cogitare in omni casu, sed tantum, cum nullum sebest fundamentum, quale

tions to be observed after my death, which will happen to-morrow night before 8 o'clock, being the Feast of Resurrection." It is proper to add, however, that Southey differed from the opinion we have expressed above, saying: "Chatterton was insane—better proof of this than the coroner's inquest, is that there was insanity in his family (his sister, Mrs. Newton, was for some period confined in a mad-house). His biographers were not informed of this important fact, and the editors of his collected works forbore to state it, because the collection was made for the benefit of his surviving relations, a sister and a niece, in both of whom the disease had manifested itself." A most peculiar case of self-destruction, traced to love melancholy, but otherwise bearing a striking resemblance to Chatterton's, occurred very recently in a small town in Massachusetts, where two young girls resolved to die together, wrote several letters to friends, dressed themselves for burial, laid themselves side by side upon a bed, and took poison,—one of them actually dying in that position.

In regard to the moral aspects of self-destruction, it may be said that the most ingenious arguments have been urged in favor of the act. It has been said that death is merely a remedy for unbearable evils, and that, consequently, it is no more wrong to take one's self out of the world, than to call in a physician or to take drugs when in physical suffering; to which Pythagoras answers by comparing a human being to a sentinel, at a post which he can not desert, whatever trials he may be called upon to endure; that life was not given by the Creator to mortals as the result of a contract that they on their part would accept it and its responsibilities and consequences, or at their request, and that they are not bound to accept it, the answer to which is given by Coleridge in his lines "The Suicide's Argument":

"Ere the birth of my life, if I wished it or no,  
No question was asked me—it could not be so?  
If the life was the question, a thing sent to try  
And to live on be YES; what can NO be? to die."

#### NATURE'S ANSWER.

"Is't returned as t'was sent. Is't no worse for the wear?  
Think first what you ARE, call to mind what you WERE!"

subest in casu regulæ; præterea non præsumitur hic malus in omni mali genere, sed in eo tantum, in quo malus inventus est, idque solum, ut impediatur ne

I gave you innocence, I gave you hope,  
Gave health and genius, and an ample scope.  
Return you me guilt, lethargy, despair;  
Make out the inven'try, inspect, compare,  
Then die—if die you dare."

And innumerable writers have urged, on the one hand, that suicide was moral courage, and on the other, that it was physical cowardice; the truth lying, probably, somewhere between the two (perhaps that the act of suicide is one combining physical courage with moral cowardice). But, besides the suicide of the boy Chatterton in the London garret, in 1770, instances, since the Christian era, will probably be very rarely found in which the fluent in arguments in favor of self-destruction as a panacea for trouble, have taken their own remedy.

The result of the inquiry—which, it is needless to say, must be pursued independently in each case—is of the utmost importance in cases of life insurance, under policies which bar suicide. We have not attempted, in this note, to do more than suggest the lines of argument which present themselves in reference to what must continue to be the most marvellous of mental phenomena. Valuable communications and essays upon the subject, examining the authorities up to the time they were written, may be found in the Albany Law Journal, i. p. 93; v. p. 53; Papers of the Medico-Legal Society of New York, i. p. 1; Am. Law Register, vol. x. p. 673.

As throwing a grotesque light upon another phase of the question of suicide as distinguishable from self-destruction, we quote the following :

"Nothing will persuade the lawyer that he does not possess in his library the original of Shakespeare's inimitable gravedigger's argument about 'crownor's quest law' in 'Hamlet'—the famous case of Hales v. Pettit, reported in old Plowden, A. D. 1550. Sir James Hales, a justice of the common pleas, committed suicide by throwing himself into a watercourse. The coroner sat upon his body, and—this being before the days of 'moral insanity'—presented that, 'passing through ways and streets of the said city of Canterbury, he, the said James Hales, did voluntarily enter the same, and did himself therein, voluntarily and feloniously, drown.' Suicide being a felony,

simile malum perpetret ; unde hæc præsumptio non obest, sed potius prodest ei in quem cadit ; uno verbo præsumptio de qua regula, non est maligna, sed cauta, utpote non nata ex prava male judicandi consuetu-

this felony worked a forfeiture of his estates. But, in answer to this, his successors pleaded that Sir James did not commit suicide ; he only threw himself into the water, and suicide implying death, as he did not die during his life, he committed no suicide. The question was then, Did Sir James commit suicide during his life ? For, if he only threw himself into the water in his lifetime, throwing himself into the water is no felony, and the suicide not being complete until his death—it being impossible for him to have died during his life—ergo, he committed no felony. This perplexing proposition was argued by six sergeants-at-law, and their wearying dialectics, here recorded in solemn black-letter, are fully as mirth-provoking as in Shakespeare's travesty. The question arose in the course of a suit for trespass brought by Lady Hales, claiming, as survivor in joint-tenancy of her husband, against one Pettit, attempting to enter by virtue of a crown-grant of the forfeited estates. The lawyers worked themselves into a hopeless desperation, which it was left for William Shakespeare to disentangle for the public verdict.

“ 1st Clown. It must be se offendendo ; it can not be else ; for here lies the point : if I drown myself wittingly, it argues an act, and an act has three branches—it is to act, to do, and to perform : argal, she drowned herself wittingly.’

“ 2nd Clown. Nay, but hear you, Goodman delver.’

“ 1st Clown. Give me leave. Here lies the water ; good. Here stands the man ; good. If the man go to this water, and drown himself, it is, will he, nil he, he goes ; mark you that : but if the water come to him, and drown him, he drowns not himself : argal, he that is not guilty of his own death, shortens not his own life.’

“ 2nd Clown. But is this law ?’

“ 1st Clown. Ay, marry is’t : crowner’s quest law.’

“ That which purges of the felony in *Hales v. Pettit* entitles to Christian burial in *re Ophelia* (reported in ‘*Hamlet*,’ vol. 1), and in either, if the water did the deed, the human being was unaccountable” (*Morgan’s Law of Literature*, note to page 522, vol. 2.

dine, aliove vitio, sed ex justo metu." (u) No considerations of policy can justify the condemnation of a man who is either innocent, or of whose guilt any reasonable doubt exists; but it is very different where there is a proved basis of guilty intention to work on. There a man is rightly held accountable for the natural consequences of his misconduct, though he may not have intended them; and perilous indeed would it be to the community were this otherwise. The enormity of an offense is made up, not only of the actual amount of mischief done by the criminal, but of the tendency of his conduct to encourage others to break the law; and in measuring this latter, regard must be had to the notorious difficulty of proving psychological facts. Look at the cases already put. (v) A man, without justification, assaults another with the intention of giving him only a slight beating; death ensues; ought a judicial tribunal to permit him to contend that he was not responsible for homicide? So, if several persons go out with the intention of committing a felony, surely the law is perfectly justified in holding each responsible for all acts done by his companions in furtherance of the general design. For not only was the person who did the act encouraged in, if not instigated to his guilt, by the presence of the rest; but when several persons are involved in such a transaction, it is often extremely difficult to apportion to each his precise share of guilty intention; and, if the onus of doing this with accuracy were cast upon the law, the most wicked and cunning criminals would frequently escape their just punishment.

(u) *Gibert. Corp. Jur. Can. Proleg.* (v) § 435.  
*Pars Post. tit. 7, cap. 2, § 2, n. 30.*

**437.** Many artificial presumptions have, from time to time, been introduced by statute into our criminal code. An instance is presented in the well-known statute 21 Jac. 1, c. 27, (*w*) by which it was enacted that any woman delivered of a bastard child, who should endeavor to conceal its birth, should be deemed to have murdered it, unless she proved it to have been born dead. (*x*) So, the 24 & 25 Vict. c. 98, s. 13, renders it felony for any person to purchase, receive, or have in his custody or possession, without lawful excuse,—the proof whereof shall lie on the party accused,—any forged bank note, or other forged document of the nature therein specified, knowing the same to be forged. So, by the 33 & 34 Vict. c. 58, s. 5, it is felony for any person, without lawful authority or excuse,—the proof whereof shall lie on the party accused,—to engrave or make any stock certificate or coupon, or to do certain other acts therein specified. And by “The Foreign Enlistment Act, 1870,” (*y*) any ship, built by order or on behalf of any foreign state when at war with a friendly state, or delivered to, or to the order of such foreign state or of any person, who, to the knowledge of the person building, is an agent of such foreign state, or which is paid for by such foreign state or such agent, and is employed in the military or naval service of such foreign state, shall, until the contrary is proved, be deemed to have been built with a view to being so employed; and the onus of proving that he did not know that the ship was intended to be so employed, is cast on the builder.

**438.** Some presumptions of the criminal law are for the protection of accused persons. Thus, an infant

(*w*) See Introd. pt. 2, § 46.

was removed by 43 Geo. 3, c. 58, s. 3.

(*x*) This reproach to our legislation

(*y*) 33 & 34 Vict. c. 90, s. 9.

under seven years of age is conclusively presumed incapable of committing felony; (*z*) between the ages of seven and fourteen the presumption exists, but may be rebutted by evidence; (*a*) and a boy under fourteen, is conclusively presumed incapable of committing a rape as principal in the first degree. (*b*)<sup>1</sup>

(*z*) 4 Blackst. Com. 23; 1 Hale, P. C. 27-8.

(*a*) 4 Blackst. Com. 23; 1 Hale, P. C. 26-7.

(*b*) *Id.* 212; and 1 Hale, P. C. 630.

<sup>1</sup> Wharton & Stiles Medical Jurisprudence, vol. 2, § 212, *et seq.*

## SUB-SECTION II.

## PRESUMPTIVE PROOF IN CRIMINAL CASES GENERALLY.

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**439.** The rules regulating the admissibility of evidence are, in general, the same in civil as in criminal proceedings; (*c*) and although presumptive evidence is receivable to prove almost any fact, (*d*) the neces-

(*c*) See bk. I, pt. I, § 94.

(*d*) Chap. I, § 294.

sity for resorting to it is more frequent in the latter than in the former. The most heinous offenses are usually committed in secret,—visible proofs of works of darkness must not be expected ;—and accordingly, direct testimony against criminals is rarely attainable, except in those cases where one of several delinquents denounces his companions at the bar of justice. We do not mean that, for want of legitimate evidence, the law condemns and punishes on that which is inferior or less conclusive—quite the reverse. A chain of presumptive evidence often affords proof quite as convincing as the testimony of eye-witnesses ; (*e*) and as in criminal trials the interests at stake are greater, and the consequences of error infinitely more serious, a higher degree of assurance is required for condemnatory decision, than in civil proceedings, where the mere preponderance of probability is sufficient ground for adjudication. (*f*)

440. While all attempts to reduce the credibility of evidence to fixed degrees, must ever be deprecated as absurd and mischievous, the experience of past ages would indeed be thrown away, if it did not point out the principal quicksands and dangers to be avoided, when dealing with the serious question of the guilt or innocence of persons charged with crime. Numerous rules have from time to time been suggested for the guidance of tribunals in this respect, among which the following are the soundest in principle, and most generally recognized in practice :

1. The onus of proving everything essential to the establishment of the charge against the accused, lies on the prosecutor. (*g*)
2. The evidence must be such as to exclude, to a

(*e*) *Id.* §§ 295, 297.

(*f*) *Bk. I, pt. I, § 95.*

(*g*) *Supra*, sect. 2, sub-sect. 3



moral certainty, every reasonable doubt of the guilt of the accused. (*h*)

3. In matters of doubt it is safer to acquit than to condemn; for it is better that several guilty persons should escape, than that one innocent person should suffer. (*i*)

441. The above hold universally: but there are two others peculiarly applicable when the proof is presumptive.

I. There must be clear and unequivocal proof of the *corpus delicti*. (*k*)<sup>1</sup> Every criminal charge involves two things: first, that an offense has been committed; and, secondly, that the accused is the author, or one of the authors, of it. "I take the rule to be this," says Lord Stowell in his judgment in *Evans v. Evans*, (*l*)—"If you have a criminal fact ascertained, you may then take presumptive proof to show who did it; to fix the criminal, having then an actual *corpus delicti* . . .; but to take presumptions in order to swell an equivocal fact, a fact that is absolutely ambiguous in its own nature, into a criminal fact, is a mode of proceeding of a very different nature, and would, I take it, be an entire misapplication of the doctrine of presumptions." Sir Matthew Hale, also, in his *Pleas of the Crown*, (*m*) laid down the two following rules, which have met with deserved approbation: "I would never convict any person for stealing the goods *cujusdam ignoti*,

(*h*) Bk. 1, pt. 1, § 95.

(*i*) Introd. pt. 2, § 49, and bk. 1, pt. 1, § 95.

(*k*) *R. v. Burdett*, 4 B. & A. 95, 123 and 162; *Wills, Circ. Evid.* 156, 3rd Ed.; *Evans v. Evans*, 1 Hagg. Consist. Rep. 35, 105; *Burnett's Crim. Law of Scotland*, 529; *D'Aguesseau*

(*Œuvres*), tom. 4, pp. 422-3, 456.

"Diligenter cavendum judici, ne supplicium præcipitet, antequam de crimine constiterit;" *Matth. de Crim. ad Dig. lib. 48, tit. 16, c. 1, n. 2.*

(*l*) 1 Hagg. Cons. Rep. 35, 105.

(*m*) 2 Hale, P. C. 290.

<sup>1</sup> See *ante*, vol. i., note 1, p. 311, and cases cited.

merely because he would not give an account how he came by them, unless there were due proof made that a felony was committed of these goods. I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead." (*n*) And in Starkie on Evidence (*o*) it is stated to be "an established rule, upon charges of homicide, that the accused shall not be convicted unless the death be first distinctly proved, either by direct evidence of the fact, or by inspection of the body." Such is the language of these eminent authorities. But the general principles they lay down must be taken with considerable limitation; and, in order to treat the subject with accuracy, it is to be remarked, that in some offenses the evidence establishing the existence of the crime also indicates the criminal, while in others the traces or effects of the crime are visible, leaving its author undetermined; the former being denominated by foreign jurists "*delicta facti transeuntis*," and the latter "*delicta facti permanentis*." (*p*) Under the former, *i.e.* *delicta facti transeuntis*, are ranged those offenses the essence of which consists in intention; such as various forms of treason, conspiracy, criminal language, &c.; all which being of an exclusively psychological nature, must necessarily be established by presumptive evidence, (*q*) unless the guilty party chooses to make a plenary confession. (*r*) To these must be added the crime of adultery, respecting which Lord

(*n*) The coincidence between this and the following is observable: "*De corpore interfecti necesse est ut constet. . . . Si quis fassus se furem, confessio hæc non obest, nisi constet etiam in specie de rebus furto substractis.*"—Matthæus, de Prob. cap. 1, n. 4.

(*o*) 1 Stark. Ev. 575, 3rd Ed.; Id.

862, 4th Ed.

(*p*) Bonnier, *Traité des Preuves*, § 56; Case of Capt. Green and his Crew, 14 Ho. St. Tr. 1230.

(*q*) 3 Benth. Jud. Ev. 5; R. v. Burdett, 4 B. & A. 95, 122; Bonnier, *Traité des Preuves*, § 56; see Introd. pt. 1, § 12.

(*r*) *Infra*, ch. 7.

Stowell himself, in other places, lays down as a fundamental rule, that it is not necessary to prove the fact by direct evidence; (*s*) but that it is enough to prove such proximate circumstances as by former decisions, or their own nature and tendency, satisfy the legal conviction of the court that the criminal act has been committed. (*t*) By the canon law of this country, however, this crime could not be proved by the unsupported confession, however plenary, of the wife. (*u*) But the Divorce Court, not being a court of ecclesiastical jurisdiction, nor bound by rules of merely ecclesiastical authority, may in such a case act on the admissions of the wife, although they are not supported by any other evidence. (*v*)

442. In the other sort of cases—*delicta facti permanentis*; or, as they have been sometimes termed, *delicta cum effectu permanente*, (*x*) the proof of the crime is separable from that of the criminal. Thus the finding a dead body, or a house in ashes, may indicate a crime, but does not necessarily afford any clue to the perpetrator. And here, again, a distinction must be drawn relative to the effect of presumptive evidence. The *corpus delicti*, in cases such as we are now considering, is made up of two things: first, certain facts forming its basis; and, secondly, the existence of criminal agency as the cause of them. (*y*) It is with respect to the former of these, that the general principles of Lord Stowell and Sir Matthew Hale especially apply,

(*s*) *Loveden v. Loveden*, 2 Hagg. Cons. Rep. 1; *Williams v. Williams*, 1 Id. 299. See to the same effect, *Ayl. Parerg. Jur. Canon. Angl.* 45; *Mascard. de Prob. Quæst.* 10, 11. 16; and *Concl.* 57–65; *Sanchez de Matrimonio*, lib. 10, *Disput.* 12, n. 40.

(*t*) *Williams v. Williams*, 1 Hagg. Cons. Rep. 299, 300.

(*u*) See the judgment of Lord Stowell, in *Mortimer v. Mortimer*, 2 Hagg. Cons. Rep. 310, 316; and *infra*, ch. 7, sect. 3, sub-sect. 3.

(*v*) *Robinson v. Robinson*, 29 L. J., P. & M. 179; *Williams v. Williams* L. Rep., 1 P. & D. 29.

(*x*) 14 Ho. St. Tr. 1230.

(*y*) "Constare (crimen) non dicitur.

the established rule being, that the facts which form the basis of the *corpus delicti* ought to be proved, either by direct testimony, or by presumptive evidence of the most cogent and irresistible kind ; or by a clear and unsuspected confession of the party. (z) This is particularly necessary in cases of murder, where the maxim laid down by Sir Matthew Hale seems to have been generally followed : namely, that the fact of death should be shown, either by witnesses who were present when the murderous act was done, or by proof of the dead body, or some portion of the dead body, having been found ; (a) and where the body is in a state of decomposition, or is reduced to a skeleton, or is, for any other reason, in such a state as to render identification by inspection impossible, it should be identified by dress or circumstances. (b) “*Liquere debet hominem esse interemptum.*” (c) <sup>1</sup>

*simul atque de facto constiterit : etiam de dolo et causâ facta liquere debet.*” Matth. de Crimin. ad Dig. lib. 48, tit. 16, c. 1, n. 2. See also Bonnier, *Traité des Preuves*, § 56.

(z) See *infra*, ch. 7.

(a) The practice of simulating death to attain particular objects is common in the East. See Family Library : *Sketches of Imposture, Deception, and Credulity*, ch. 9, p. 139. “When some officers in India were breakfasting in the commander’s tent, the body of a native, said to have been murdered by the sepoys, was brought in and laid down. The crime could not be brought home to any one of them, yet there was the body. A suspicion, however, crossed the adjutant’s mind, and, having the kettle in his hand, a thought struck him that he would

pour a little boiling water on the body. He did so ; on which the murdered remains started up and scampered off.” No authority is cited.

(b) In *R. v. Clewes*, 4 C. & P. 221, the skeleton of a man was, after a lapse of twenty-three years, identified by his widow, from some peculiarity about the teeth. A carpenter’s rule and a pair of shoes found with his remains were also identified. When a skeleton is found, it frequently becomes of the utmost importance to determine whether it is that of a male or female, of a young or old person. For full information on this subject the reader is referred to Beck’s *Med. Juris*, p. 539, *et seq.* 7th ed., where several cases illustrative of the necessity of attending to it are given.

(c) D’Aguesseau (*Œuvres*), tom. 4, p. 456.

<sup>1</sup> See *ante*, vol. i., p. 311, note 1, citing the cases of *Uzzerdook* and *Webster*.

**443.** This rule rests on principles which have their foundation in the deepest equity and soundest policy. In the first place, when the crime is separable from the person of the criminal, many sources of error are introduced which do not exist in the opposite case.

1. A given event, the origin of which is unascertained, may be the result of almost innumerable causes, having their source either in accident or the agency of other persons. 2. The danger of rashly inferring the guilt of a suspected person from inconclusive circumstances, may be aggravated by his own imprudence, or even by his criminal agency in other matters. 3. In witnesses and tribunals, the love of the marvellous and the desire to detect great crimes committed in secret. 4. The facility afforded by the preceding causes, to false accusations against persons who are disliked. In the second place, the conviction of a man for an imaginary offense, is a scandal to the administration of justice, and is also an injury to society, infinitely greater than an erroneous conviction for an offense really committed. (*d*)

**444.** The sound policy of this rule is fearfully established by some old cases. A very celebrated one, related by Sir Edward Coke, has been already given under the head of presumptions made in disfavor of the spoliator. (*e*) Sir Matthew Hale also mentions an instance, where a man was missing for a considerable time, and there was strong ground for presuming that another had murdered him, and consumed the body to ashes in an oven. The supposed murderer was convicted, and executed; after which the other man returned from sea, where he had been sent against

(*d*) See *Introd.* pt. 2, § 49, and note  
(*g*) there.

(*e*) *Supra*, sect. 2, sub-sect. 8, § 415.

his will by the accused, who, though innocent of murder, was not entirely blameless. (*f*) There is also the case of a man named John Miles, who was executed for the murder of his friend William Ridley, with whom he had been last seen drinking, and whose body was not found until after the execution of Miles. The deceased had, while in a state of intoxication, fallen into a deep privy, where no one thought of looking for him. (*g*) This rule is said to have been carried so far, that, where the mother and reputed father of a bastard child, were observed to strip and throw it into the dock of a seaport town, after which the body of the infant was never seen, Gould, J., who tried the father and mother for the murder, advised an acquittal, on the ground that, as the tide of the sea flowed and reflowed into and out of the dock, it might possibly have carried out the living infant. (*h*)

445. Where, however, the fact of the murder is proved by eye-witnesses, the inspection of the dead body may be dispensed with ; as is well illustrated by the case of *R. v. Hindmarsh*. (*i*) There the prisoner, a seaman, was charged with the murder of his captain. The first count of the indictment alleged the murder to have been committed by blows with a large piece of wood, and the second by throwing the deceased into the sea. It appeared in evidence that, while the ship was lying off the coast of Africa, with other vessels near, the prisoner was seen one night to take the captain up and throw him into the sea, after which he was never heard of ; while, near the place on

(*f*) 2 Hale, P. C. 290.

Ed. Richer, Amst. 1773.

(*g*) Theory of Presumptive Proof, Append. case 5. See also the case of Antoine Pin, 5 Causes Célèbres, 449,

(*h*) Per Garrow, *arguendo*, in *R. v. Hindmarsh*, 2 Leach, C. L. 569, 571.

(*i*) 2 Leach, C. L. 560.

the deck where the captain was seen, was found a billet of wood, and the deck and part of the prisoner's dress were stained with blood. On this it was objected by the prisoner's counsel, that the *corpus delicti* was not proved, as the captain might have been taken up by some of the neighboring vessels; citing Sir Matthew Hale and the case before Gould, J. The court, consisting of the judge of the Admiralty, Ashhurst, J., Hotham, B., and several doctors of the civil law, admitted the general rule of law; but Ashhurst, J., who tried the case, left it to the jury upon the evidence, to say whether the deceased was not killed before his body was cast into the sea; and the jury having found in the affirmative, the prisoner was convicted, which conviction was afterwards held good by all the judges.

446. Whether it is competent, even in extreme cases, to prove the basis of the *corpus delicti* by presumptive evidence, has been questioned. But it seems a startling thing to proclaim to every murderer that, in order to secure impunity to himself, he has nothing to do but consume or decompose the body by fire, by lime, or by any other of the well-known chemical menstrua, or to sink it in an unfathomable part of the sea. (j) Unsuccessful attempts of this kind are known to have been made, (k) and successful ones may have remained undiscovered.

(j) 3 Benth. Jud. Ev. 234; Bonnier, *Traité des Preuves*, § 56. We believe that Rolfe, B., once directed a grand jury, that the rule excluding presumptive evidence of the basis of the *corpus delicti* is not universal. On this subject Chancellor D'Aguesseau expresses himself as follows:—"A Dieu ne plaise que le public puis jamais nous reprocher que nous donnons aux crim-

inels une espérance d'impunité, en reconnaissant qu'il est impossible de les condamner, lorsque leur cruelle industrie aura été assez heureuse pour dérober aux yeux de la Justice, les misérables restes de celui qu'ils ont immolé à leur vengeance." D'Aguesseau, *les Plaidoyer dans la cause du Sieur de la Pivardière*, &c.

(k) In *R. v. Cook*, Leicester Sum.

447. The basis of a *corpus delicti* once established presumptive evidence is receivable to complete the proof of it; as, for instance, to fix the place of the commission of the offense (*l*)—the *locus delicti*; (*m*) and even to show the presence of crime, by negating the hypotheses, that the facts proved were the result of natural causes, or irresponsible agency. For this purpose all the circumstances of the case, and every part of the conduct of the accused, may be taken into consideration. (*n*) On finding a dead body, for instance, it should be considered whether death may not have been caused by lightning, cold, noxious exhalations, &c., or have been the result of suicide. On this latter subject the following excellent directions, given by Dr. Beck to the members of his own profession, may not inaptly be inserted here: (*o*) “ Besides noticing the surface of the body, and ascertaining whether ecchymosis or suggillation be present, we should pay great attention to the following circumstances: The situation in which the wounded body is found, the po-

Ass. 1834, Wills' Circ. Ev. 165, 3rd Ed., the prisoner was tried for the murder of a creditor who had called to obtain payment of a debt, and whose body he had cut into pieces and attempted to dispose of by burning. The effluvium and other circumstances, however, alarmed the neighbors, and a portion of the body remaining unconsumed, the prisoner was convicted and executed. A similar attempt was made by the accused in *The Commonwealth v. Webster*, Burr. Circ. Evid. 682.

(*l*) *R. v. Burdett*, 4 B. & A. 95.

(*m*) *Dicks*. Ev. in *Scotl.* 43.

(*n*) So laid down by Buller, J., in the celebrated case of Captain John Donellan, who was convicted and executed for the murder by poison of

his brother-in-law, Sir Theodosius Boughton (*Warwick Sp. Ass.* 1781, Report by Gurney): by Parke, B., in *R. v. Tawell*, who was convicted of murder by poison at the Aylesbury Spring Assizes of 1845 (*Wills' Circ. Ev.* 188, 3rd Ed.); by Abbott, J., in *R. v. Donnell*, *Launceston Sp. Ass.* 1817 (*Id.* 187); by Wilde, C. J., in *R. v. Hatfield*, *Surr. Sp. Ass.* 1847, MS.; by Lord Campbell, in *R. v. Palmer*, *Cent. Cr. Ct.* May, 1856; and by Pollock, C. B., in *R. v. Smethurst*, *Cent. Cr. Ct.* August, 1859. See also *R. v. Eldridge*, *R. & R.* 440, and *R. v. White*, *Id.* 508.

(*o*) Beck's *Med. Jurisp.* 583, 7th Ed. where several very instructive cases are collected.



sition of its members, and the state of its dress, the expression of countenance, the marks of violence, if any be present on the body, the redness or suffusion of the face. The last is important, as it may indicate violence in order to stop the cries of the individual. The quantity of blood on the ground, or on the clothes, should be noticed, and, in particular, the probable weapon used, the nature of the wound, and its depth and direction. In a case of supposed suicide, by means of a knife or pistol, the course of the wound should be examined, whether it be upwards or downwards, and the length of the arm should be compared with the direction of the injury. Ascertain whether the right or left arm has been used ; and, as the former is most commonly employed, the direction should correspond with it, and be from right to left." It is of the utmost importance to examine minutely, for the traces of another person at the scene of death ; for it is by no means an uncommon practice with murderers, so to dispose of the bodies of their victims, as to lead to the supposition of suicide or death from natural causes ; (*p*) while, on the other hand, persons about to commit suicide, but anxious to preserve their reputation after death or their property from forfeiture, or both, have not unfrequently endeavored, by special preparations, to avert suspicion of the mode by which they came by their end. (*q*) And instances have occurred where, after death from natural causes, injuries have been done to a corpse with a view of raising a suspicion of murder against an innocent person. (*r*) The following case strongly illustrates the difficulties which sometimes attend investigations of this nature : A man, on

(*p*) Stark. Ev. 857, 4th Ed.

(*q*) Id. 863, 4th Ed.

(*r*) See one of these, bk 2, pt. 2, § 206.

detecting his wife in the act of adultery, fell into a state of distraction, and having dashed his head several times against a wall, struck himself violently and repeatedly on the forehead with the cleaver, until he fell dead from a great number of wounds. All this was done in the presence of several witnesses; but suppose it had been otherwise, and that the dead body had been found with these marks of violence upon it, murder would have been at least suspected. (s) And even where there is the clearest proof of the infliction of wounds, death may have been caused by previous disease, or by violence from some other source. Cases illustrative of the former hypothesis are pretty numerous; (t) and the two following show the necessity of not overlooking the latter. At an inn in France, a quarrel arose among some drovers, during which one of them was wounded with a knife on the face, hand and upper part of the thorax near the right clavicle. The injuries were examined and found to be superficial and slight. They were washed, and an hour afterwards the wounded man departed for his home, but the next morning he was found dead, bathed in blood. Dissection was made, and the left lung and pulmonary artery were found cut. The surgeons deposed that this injury was the cause of death, and that it must have been inflicted after the superficial wound on the thorax, which was not bloody, but surrounded by ecchymosis. Such proved to be the fact—on his way home he had been robbed and murdered. (u) In another case a girl expired in convulsions while her father was in the act of chastising her for a theft; and she was believed, both by himself and the bystanders

(s) Beck's Med. Jurisp. 562, 7th Ed.

lor's Med. Jurisp. ch. 29, 7th Ed.

(t) Several will be found in Beck's Med. Jurisp, ch. 15, 7th Ed., and Tay-

(u) Beck's Med. Jurisp. 588, 7th Ed.

to have died of the beating. But, although there were marks of a large number of pretty severe stripes on the body, they did not appear to the medical man who saw it to be quite sufficient to cause death; and he therefore made a post-mortem examination, from which and other circumstances it was discovered, that the girl on finding her crime detected had taken poison through fear of her father's anger. (v)

And, lastly, a source of mischief is found in the destruction or fabrication of indicia, through the conduct of persons brought in contact, by duty or otherwise, with the bodies of individuals who have met with a violent death. In such cases, as is well observed by a recent writer on circumstantial evidence: "The first observers are often persons who are so exclusively impressed by the event itself, as to overlook what, at the time, may naturally be deemed insignificant matters; to take no note of them, or at least, none that can be confidently recalled to mind afterwards. The common attentions of humanity all partake of this summary character. The first impulse is to see what relief can be afforded in the case. The body of the sufferer is turned over, raised up, perhaps removed, the blood carefully washed from the wound, &c. In this way important indications may, inadvertently, be wholly obliterated. But a similar injurious effect upon the evidentiary facts may be produced by the officious action of one or more persons, attracted to the spot by mere curiosity. The implement of destruction is often first discovered by observers of this class; it is handled with more or less of interest,—passed possibly from hand to hand among several,—until by this very process, it is more or less deprived of the appearances

which give it its peculiar value as an instrument of evidence. In this way not only may genuine facts be destroyed and lost, but spurious facts may be actually, though unintentionally, fabricated and interpolated into the case, to the obvious deception or confusion of those who come to observe afterwards, and who may be the witnesses actually called upon to testify." (*x*) A good illustration of this is afforded by a case which once occurred in France. A young man was found dead in his bed, with three wounds on the front of his neck. The physician who was first called to see him had, unknowingly, stepped on the blood with which the floor was covered, and then walked into an adjoining room, passing and repassing several times, and thus left a number of bloody footprints on the floor. The consequence was that suspicion was raised against a party, who narrowly escaped being sent to take his trial for murder. (*y*)

448. It is in cases of supposed poisoning, that the nicest questions arise relative to the proof of a *corpus delicti*. The evidences of poisoning are either physical or moral. Under the former are included the symptoms during life; the appearance of the body after death, or on dissection; and the presence of poison, ascertained by the application of chemical agents used for its detection. Among the moral evidences are peculiar facilities for committing the crime, the purchasing or preparing poisonous ingredients, attempts to stifle inquiry, spreading false rumors as to the cause of death, abortive endeavors to cast suspicion on others, &c. (*z*) The existence of disease (and poison is not unfrequently administered

(*x*) Burrill, *Circ. Ev.* 141-2.

(*y*) Tayl. *Med. Jurisp.* 274, 7th Ed.

(*z*) "Venenum arguis: ubi emi? à

quò? quanti? per quem dedi? quo conscio?" Quintilian, *Inst. Orat.* lib

5, c. 7, vers. fin.

to persons laboring under it), will often explain the symptoms during life, and, in some cases, the appearances after death, which latter may likewise be the result of putrefaction ; so that, in order to obtain clear proof of a *corpus delicti*, tribunals willingly avail themselves of the scientific tests which chemistry lends to justice for the detection of crime. (*a*) The value of these tests has, however, been much over-estimated. An infallibility has been attributed to them which they most certainly do not possess ; and a notion seems to have got abroad, that in cases of poisoning, the *corpus delicti* must be established by those tests alone, to the exclusion of all consideration of the physical and moral circumstances of the case, —a doctrine which is both contrary to law, (*b*) and an outrage on common sense. The science of toxicology is not by any means in a perfect state, particularly as regards the vegetable poisons ; (*c*) although the tests for one of the worst of them (hydrocyanic, or prussic acid), and for the mineral poison most commonly used for criminal purposes (arsenic), are among the most complete. It is always advisable to employ as many tests as the quantity of suspected matter will admit ; for in the case of each individual test there may, by possibility, be other substances in nature, which would produce the appearances supposed to be peculiar to the particular poison ; and the danger always exists, more or less, of forming the substance, the existence of which is suspected, by means of the chemical agents used for its detection. But when several tests, based on principles totally

(*a*) The tests of a large number of poisons are given with great minuteness in Beck's Med. Jurisp. See also

Taylor's Med. Jurisp.

(*b*) See *supra*, § 447.

(*c*) Beck's Med. Jurisp. 754, 7th Ed

distinct, are applied to different portions of a suspected substance, and each gives the characteristic results of a known poison, the chances of error are indefinitely removed; and the proof of the existence of that poison in that substance, especially if there are corroborative circumstances, comes short only of positive demonstration.<sup>1</sup>

449. In dealing with cases of suspected poisoning it must be remembered, that even when poison is actually obtained from the dead body, it may not only have been taken by accident, or with the view of committing suicide, but that instances have occurred, where, after death from natural causes, a poisonous substance has been introduced into the corpse, (*d*) or into matter vomited or discharged from the bowels, (*e*) with the view of raising a suspicion of murder. This may, however, be detected by a careful post mortem examination, (*f*) and attention to the moral circumstances of the case.<sup>2</sup>

450. Whatever may be the admissibility or effect of presumptive evidence to prove the corpus delicti, it is always admissible, and it is often, especially when amounting to *evidentia rei*, most powerful to disprove it. Thus, the probability of the statements of witnesses may be tested by comparing their story with the surrounding circumstances; and in practice false testimony is often encountered and overthrown in this way. Sir Mathew Hale relates an extraordinary

(*d*) Beck's Med. Jurisp. 770, 7th Ed.

(*e*) Taylor's Med. Jurisp. 16, 4th Ed.

(*f*) Some consequences of poisoning during life, such, for instance, as

the traces of recent inflammation in the upper intestines, can not, it is said, be imitated by poison injected after death. Beck's Med. Jurisp. 770, 7th Ed.

<sup>1</sup> Wharton on Homicide, § 727.

<sup>2</sup> See *post*, note to chapter on Opinion Evidence, as to the taking of life by poisons, and the evidence in such cases.

trial for rape, which took place before him in Sussex; where the party indicted was an ancient wealthy man, turned of sixty, and the charge was fully sworn against him by a young girl of fourteen, with the concurrent testimony of her mother and father and some other relations; and where the accused defended himself successfully, by showing that he had for many years been afflicted with a rupture, so hideous and great as to render sexual intercourse impossible. (*g*) In another case, the prosecutrix of an indictment against a man, for administering arsenic to her to procure abortion, deposed that he had sent her a present of tarts, of which she partook, and that shortly afterwards she was seized with symptoms of poisoning. Amongst other inconsistencies, she stated that she had felt a coppery taste in the act of eating, which it was proved that arsenic does not possess; and from the quantity of arsenic in the tarts which remained untouched, she could not have taken above two grains; while, after repeated vomitings, the alleged matter subsequently preserved contained nearly fifteen grains, though the matter first vomited contained only one grain. The prisoner was acquitted, and the prosecutrix afterwards confessed that she had preferred the charge from jealousy. (*h*)

**451. II.** The hypothesis of delinquency should be consistent with all the facts proved. (*i*) The chief danger to be avoided when dealing with presumptive evidence, arises from a proneness natural to man, to jump to conclusions from certain facts, without duly advertng to others, which are inconsistent with the

(*g*) 1 Hale, P. C. 635. See bk. 2, pt. 2, § 201.

(*h*) R. v. Whalley, York Sp. Ass. 1829, Wills' Circ. Ev. 122, 3rd Ed. See further on this subject the elabor-

ate judgement of Lord Stowell in Evans v. Evans, 1 Hagg. Cons. Rep. 105.

(*i*) 1 Stark. Ev. 561, 573, 3rd Ed. Id. 842, 859, 4th Ed.

hypothesis which those facts seem to indicate. (*k*) "The human mind," says Lord Bacon, (*l*) "has this property, that it readily supposes a greater order and conformity in things than it finds; and although many things in nature are singular and entirely dissimilar, yet the mind is still imagining parallels, correspondences, and relations between them which have no existence." This tendency of the mind is very perceptible in the physical sciences, of which perhaps the most apposite instance, is its having been for so many ages assumed as indisputable, that the planetary motions must necessarily be circular, or at least compounded of circular motions, to the utter exclusion of all less regular figures. (*m*) When Copernicus also promulgated his theory of the solar system, it was objected that, if this hypothesis were true, the inferior planet Venus must, at times, appear gibbous like the moon; a fact which was afterwards fully established, on the invention of the telescope. (*n*) And in dealing with questions of fact, this natural propensity can not be too closely watched. If, as was well

(*k*) *Supra*, ch. I, § 298.

(*l*) "Intellectus humanus, ex proprietate suâ, faciliè supponit majorem ordinem et æqualitatem in rebus, quàm invenit: et cùm multa sint in naturâ monodica et plena imparitatis, tamen affingit parallela, et correspondentia, et relativa quæ non sunt." Bacon's *Novum Organum*, Aphorism 45. See also Bacon's *Advancement of Learning*, bk. 2.

(*m*) This ancient prejudice proved a great source of embarrassment to Kepler, by whom the elliptical movements were first discovered. In investigating the planetary orbits, he says, "Primus meus error, fuit, viam planetæ perfectum esse circulum; tantum nocentior

temporis fur, quanto erat ab auctoritate omnium philosophorum instructor et metaphysicæ in specie convenientior." Kepler, *De Motibus Stellæ Martis*, pars 3, cap. 40. So, it was a received notion among many in the earlier and middle ages, that the number seven enjoyed a species of predominance in creation—there being seven notes in music, seven primary colors, seven days in the week, &c.; from all of which it was sagaciously inferred that there necessarily *could not* be more than seven planets.

(*n*) Herschel's *Discourse on the Study of Natural Philosophy*, pt. 3. ch. 3.



said by some one, a certain number of pieces of wood will build a house, with the exception of one cross beam, it is the natural tendency of the mind to reject that beam. It should never be forgotten, as observed by an able writer on the law of evidence, that all facts and circumstances which have really happened, were perfectly consistent with each other, for they did actually so consist; (*o*) an inevitable consequence of which is, that if any of the circumstances established in evidence, is absolutely inconsistent with the hypothesis of the guilt of the accused, that hypothesis can not be true. Take the case, put in a former section, (*p*) of a man being indicted for stealing a piece of timber, and a large body of circumstantial evidence being adduced, to show that it was carried off by one person, and that person the prisoner. Now, suppose it were to transpire, in the course of the trial, that the article stolen was so heavy that twenty men could not move it, here would be a fact absolutely inconsistent with the hypothesis of guilt, and clearly indicating mistake or mendacity somewhere. And not only may the hypothesis of guilt be overturned by facts absolutely falsifying it, but due attention should be paid to all contrary hypotheses and infirmative circumstances.

(*o*) 1 Stark. Ev. 560, 3rd Ed.; Id. 842, 4th Ed.

(*p*) *Supra*, sect. 1, sub-sect. 3 § 332.

## SUB-SECTION III.

## INCULPATORY PRESUMPTIVE EVIDENCE IN CRIMINAL PROCEEDINGS.

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452. We now proceed to examine more in detail the principal forms of inculpatory presumptive evidence in criminal cases. They are reducible to these general heads: (*q*)

First. Real Evidence, or evidence from things.

Secondly. Evidence derived from the antecedent conduct or position of the accused. Under this head

(*q*) The author deems it common justice, to acknowledge the large use he has made throughout this sub-section, of the 5th Book of Bentham's *Treatise on Judicial Evidence*, where he treats of circumstantial evidence. In that part of his work, we have the

full benefit of the strong sense and observant mind of the writer, comparatively free from the peculiar notions and erroneous views which pervade and disfigure so much of the rest.

come motives to commit the offense : means, and opportunities of committing it : preparations for the commission of, and previous attempts to commit it : declarations of intention, and threats to commit it.

Thirdly. Evidence derived from the subsequent conduct of the accused. To this class belong sudden change of life or circumstances : silence when accused : false or evasive statements made by the accused : suppression or eloinment of evidence : forgery of exculpatory evidence : evasion of justice, by flight or otherwise : tampering with officers of justice : and fear, indicated either by passive deportment or a desire for secrecy.

Fourthly. Confessorial evidence.

Each of these has of course its peculiar probative force and infirmative hypotheses. The subject of real evidence has been treated in a former part of this work ; (r) the suppression and eloinment of evidence, and the forgery of exculpatory evidence, have been mentioned under the head of presumptions in disfavor of a spoliator ; (s) while silence under accusation, and false or evasive statements, as likewise confessorial evidence, will be reserved for the title of self-regarding evidence, (t) to which they most properly belong. The others will now be treated in their order.

453. I. Motives to commit the offense, and means and opportunities of committing it.—A mischievous event being supposed to have been produced, and Titius being suspected of having been concerned in the production of it, "What could have been his motive?" says a question, the pertinency of which will never be matter of dispute. (u) The mere fact,

(r) Bk. 2, pt. 2.

(s) *Supra*, sect. 2, sub-sect. 8.

(t) *Infra*, ch. 7.

(u) 3 Benth. Jud. Ev. 183.

however, of a party being so situated, that an advantage would accrue to him from the commission of a crime, amounts to nothing, or next to nothing, as a proof of his having committed it. Almost every child has something to gain by the death of his parents, but how rarely, on the death of a parent, is parricide even suspected? (*x*) Still, under certain circumstances, the existence of a motive becomes an important element in a chain of presumptive proof; as where a person, accused of having set fire to his house, has previously insured it to an amount exceeding its value; or where a man, accused of the murder of his wife, has previously formed an adulterous connection with another woman, &c. On the other hand, the absence of any apparent motive is always a fact in favor of the accused; although the existence of motives, invisible to all except the person who is influenced by them, must not be overlooked. The infirmative hypotheses affecting motives to commit an offense are applicable, also, to means and opportunities of committing it; (*y*) and some unhappy cases show the danger of placing undue reliance on them. A female servant was charged with having murdered her mistress. No persons were in the house but the deceased and the prisoner, and the doors and windows were closed and secure as usual. The prisoner was condemned and executed, chiefly on the presumption that no one else could have had access to the house; but it afterwards appeared, by the confession of one of the real murderers, that they had gained admittance into the house, which was situated in a narrow street, by means of a board thrust across the street from an upper window of an opposite house, to an upper win-

(*x*) *Id.* 187-8.(*y*) *Id.* 189.

dow of that in which the deceased lived; and that, having committed the murder, they retreated the same way, leaving no traces behind them. (z)

454. II. Preparations for the commission of an offense, and previous attempts to commit it.—Under the head of preparations for the commission of an offense, may be ranked the purchasing, collecting, or fashioning instruments of mischief; repairing to the spot destined to be the scene of it; acts done with the view of giving birth to productive or facilitating causes, or of removing obstructions to its execution, or averting suspicion from the criminal. (a) Besides preparations of this nature, which are immediately pointed to the accomplishment of the principal design, there are others of a secondary nature, for preventing discovery or averting suspicion of the former. (b) In addition to these preparations of the second order, may be imagined preparations of the third and fourth orders, and so on. (c)

455. Of all species of preparations, those which are resorted to for the purpose of averting suspicion from the criminal, require the the most particular notice. A remarkable instance is presented in the case of Richard Patch, who was convicted and executed for the murder of his patron and friend Isaac Blight. The prisoner and deceased lived in the same house, and the latter, while sitting one evening in his parlor, was shot by a pistol from an unseen hand. A strong and well-connected chain of circumstantial evidence fixed Patch as the murderer; in the course of which it appeared that, a few evenings before that on

(z) Stark. Ev. 865, 4th Ed. For another instance, see Burrill, Circ. Evid. 371.

(a) 3 Benth. Jud. Ev. 63, 64.

(b) Id. 64.

(c) Id. 65.

which the murder was committed, and while the deceased was away from home, a loaded gun or pistol had been discharged into the room, in which the family when at home usually passed their evenings. This shot the prisoner represented at the time as having been fired at him, but there was every reason to believe that it must have been fired by himself, in order to induce the deceased and his servants to suppose that assassins were prowling about the building. (*d*) Murderers are frequently found busy for some time previous to their crime, in spreading rumors that from ill-health, imprudence, or other cause, the existence of their victim is likely to be short; (*e*) others prophesy impending mischief to him in more defined terms; and those in the lower walks of life throw out dark and mysterious hints as to his approaching death. (*f*) The object of all this is to prepare the minds of his friends and neighbors for the event, and by diminishing surprise, to prevent investigation into its cause.<sup>1</sup> Previous attempts to commit

(*d*) Trial of Richard Patch, for the murder of Isaac Blight, London, 1806. For another instance, see *R. v. Courvoisier*, Wills, Circ. Ev. 241, 3rd Ed.

(*e*) 3 Benth. Jud. Ev. 65-66; Wills, Circ. Ev. 79, 3rd Ed.

(*f*) Stark. Ev. 850, 4th Ed.

<sup>1</sup> See, perhaps, the most remarkable case of attempted forgery of evidence on record, in *Commonwealth v. Knapp* in Massachusetts, in 1830. Mr. White, a wealthy and highly respectable citizen of Salem, in that state, about eighty years of age, was murdered in his bed on the morning of April 7th, of that year, under such circumstances as to create the greatest public excitement. Mr. White was childless, and his only legal representatives in case of his death would be his housekeeper, a Mrs. Beckford, who was the only child of a deceased sister, and four nephews and nieces, children of a deceased brother. He was known to have executed a will, by which he left the larger portion of his property to Stephen White, one of the children of the testator's brother, and only a small

an offense are closely allied to preparations for the commission of it, and only differ in being carried

legacy to Mrs. Beckford. A daughter of Mrs. Beckford married Joseph J. Knapp, Jr., the son of Joseph J. Knapp, a ship-master of Salem. Shortly after the murder, Joseph J. Knapp, the father, received a letter obscurely intimating that the party writing the letter was possessed of a secret connected with the murder, for the preservation of which he demanded a "loan" of three hundred and fifty dollars. This letter Mr. Knapp, unable to comprehend it, handed to his son, Joseph J. Knapp, Jr., who returned it, saying he might hand it to a vigilance committee, which had been appointed by the citizens on the subject. This he did, and it led to the arrest of Charles Grant, the writer. Grant was led to make a statement to the effect that he had been a guest of two brothers, R. Crowninshield, Jr., and J. Crowninshield, who had been employed by John Francis Knapp, a brother of Joseph J., Jr., to kill Mr. White, for which Joseph J., Jr., was to pay them one thousand dollars; the motive being the supposition on Knapp's part, that, in case Mr. White should die intestate (they undertaking to possess themselves of and destroy the will, at or about the time of the murder), a moiety of his property would go to Mrs. Beckford, his sister, and the other to the children of his deceased brother, in which case Knapp's wife would be Mrs. Beckford's heir. Grant had himself been solicited to assist the Crowninshields at the murder, but had declined. He (Grant) had been informed by George Crowninshield that the housekeeper would be away all the time; that the object of Joseph J. Knapp, Jr., was first to destroy the will, and that he could get from the housekeeper the keys of the iron chest in which it was kept. On the night of the murder, Grant stayed at the "Half-way House," in Lynn. In the meantime suspicion was greatly strengthened by Joseph J. Knapp, Jr., writing a pseudonymous letter to the vigilance committee, trying to throw the suspicion on Stephen White. Richard Crowninshield, George Crowninshield, Joseph J. Knapp, Jr., and John F. Knapp, were arrested and committed for murder. The sequel was tragic. Joseph J. Knapp, under promise of government favor, made a confession, which, however, afterwards, upon the trial, he refused to testify to. Richard Crowninshield made an ineffectual attempt, when in prison, to influence Grant, who was in the cell below, not to testify, and when this failed, committed suicide. John F. Knapp was then convicted

one step further and nearer to the criminal act, of which, however, like the former, they fall short. (*g*)<sup>1</sup>

456. The probative force, both of preparations and previous attempts, manifestly rests on the presumption, that an intention to commit the individual offense was formed in the mind of the accused, which persisted until power and opportunity were found to carry it into execution. But however strong this presumption may be when the *corpus delicti* has been proved, it must be taken in connection with the following infirmative hypothesis. 1<sup>o</sup>. The intention of the accused in doing the suspicious act is a psychological question, and may be mistaken. His intention may either have been altogether innocent, or, if criminal, directed towards a different object. (*h*) 1. Thus a person may be poisoned, and another, innocent of his death, may, a short time before, have purchased a quantity of the same poison for the purpose of destroying vermin. So, predictions of approaching mischief to an individual, who is afterwards found murdered, may frequently be explained on the ground that the accused was really speaking the conviction of

(*g*) 3 Benth. Jud. Ev. 69.

(*h*) 3 Benth. Jud. Ev. 72.

as principal, and Joseph J. Knapp, Jr., as accessory before the fact, and were executed. George Crowinshield proved an alibi, and was discharged.

It is curious to observe that the murderers acted on a mistake of law, they supposing that Mr. White's representatives, in case of his death intestate, would take *per stirpes*, whereas in fact they would take *per capita*; so that Mrs. Beckford, to increase whose estate the murder was committed, actually received no more by an intestacy than she would have by the will. The prosecution in this famous case was conducted by Daniel Webster, and his summing up therein is one of the most masterly efforts in the history of jurisprudence.

<sup>1</sup> But as to inferences from such previous attempts, see Wharton on Homicide, § 696.



his own mind, without any criminal intention—prophecies of death are much more frequently the offspring of superstition than of premeditated assassination. 2. As an example of criminal intention with a different object—murder by fire-arms is not uncommon; and a person innocent of a murder might, a short time previous to its commission, have purchased a gun for the purpose of poaching, or even have stolen one which is found in his possession. So, A might purchase a sword or pistol for the purpose of fighting a duel with B; and before the meeting took place, the weapon might be purloined or stolen by C, in order to assassinate D.

457. 2°. But, even when preparations have been made with the intention of committing, or previous attempts have been made to commit, the identical offense charged, two things remain to be considered: (i) 1. The intention may have been changed or abandoned, before execution. Until a deed is done, there is always a *locus pœnitentiæ*; and the possibility of a like criminal design having been harbored and carried into execution by other persons, must not be overlooked. 2. The intention to commit the crime may have persisted throughout, but the criminal may have been anticipated by others. A remarkable instance of this is presented by the celebrated case of Jonathan Bradford. This man was an innkeeper. In the middle of the night, a guest in his house was found murdered in bed, his host standing over the bed, with a dark lantern in one hand and a knife in the other. The knife and the hand which held it were both bloody, and Bradford on being thus discovered exhibited symptoms of the greatest terror. He was

convicted and executed for this murder ; but it afterwards appeared that it had been committed by another person immediately before Bradford came into the room of the deceased. He had, however, entered the room with a similar design ; the symptoms attributed to consciousness of guilt, were partly attributable to surprise at finding his purpose anticipated ; while the blood on his hand and on the knife was occasioned by his having, when turning back the bed clothes to see if the deceased were really dead, dropped the knife on the bleeding body. (*k*)

458. III. Declarations of intention to commit an offense, and threats to commit it.—Next to preparations and attempts, follow declarations of intention, and threats to commit the offense which is found perpetrated. Most of the infirmative hypotheses applicable to the former, are incident to those now under consideration ; and these, besides, have some which are peculiar to themselves. 1st. The words supposed to be declaratory of criminal intention, may have been misunderstood, or misremembered. 2nd. It does not necessarily follow because a man avows an intention, or threatens to commit a crime, that such intention really exists in his mind.<sup>1</sup> The words may have been uttered through bravado, or with the view of annoying, intimidating, extorting money, or for some other collateral object. 3rd. Besides, another person really desirous of committing the offense, may have profited by the occasion of the threat to avert

(*k*) Theory of Pres. Proof, Append. Case 7.

<sup>1</sup> So in the Parkman-Webster Case, the former's life had been repeatedly threatened by irritated tenants, yet he was finally murdered by one who had used none. See Webster Case, *ante*, vol. i. note, p. 333.

suspicion from himself. (*l*) 4th. It must be remembered that a threat or declaration of this nature tends to frustrate its own accomplishment. By threatening a man you put him upon his guard, and force him to have recourse to such means of protection as the law, or any extra judicial powers which he may have at command, may be capable of affording to him. (*m*) "Still, however," as has been judiciously observed, "by the testimony of experience, criminal threats are but too often, sooner or later realized. To the intention of producing the terror, and nothing but the terror, succeeds, under favor of some special opportunity, or under the spur of some fresh provocation, the intention of producing the mischief; and (in pursuance of that intention) the mischievous act." (*n*) "Threats," observes a recent author, (*o*) "are often disregarded and despised; it is only the more timid dispositions that are influenced by them; and in most minds, there is an unwillingness, even if fear be felt, to manifest it by any outward acts or cautionary pro-

(*l*) A curious instance of this is related by a very old French authority. A woman of extremely bad character, one day, in the open street, threatened a man who had done something to displease her, that she would "get his hams cut across for him before long." A short time afterwards, he was found dead, with his hams cut across, and several other wounds. This was of course sufficient to excite suspicion against the female, who, according to the practice of continental tribunals at that time, was put to the torture, confessed the crime, and was executed. Shortly afterwards, however, a man who had been taken into custody for some other offense, declared that she was innocent, and that the murder

had been committed by another man, of whom he was the accomplice. That person was immediately arrested, and confessed the whole truth as follows: that happening to be passing in the street when the threat was uttered, he took advantage of that circumstance to make away with the murdered man, well assured that the woman's bad character would immediately direct towards her the attention of the officers of justice. Papon, Arrests, Liv, 24, tit. 8, arrest 1; cited, not very accurately, in the *Causes Célèbres*, vol. 5, p. 437, Ed. Richer, Amsterdam, 1773.

(*m*) 3 Benth. Jud. Ev. 78.

(*n*) Id.

(*o*) Burrill, Circ. Ev. 342.

ceedings. To this contempt of the mere language of an enemy, and the exposure of person which has followed, have many courageous persons notoriously owed their deaths. And it may be that the threatener, in these cases, has counted in advance, upon this very circumstance.”<sup>1</sup>

**459. IV. Change of life or circumstances.**—Having examined the probative force of criminative facts existing before, though perhaps not discovered until after the perpetration of the offense, we proceed to consider those occurring subsequent to it. Among these the first that naturally presents itself to notice, is a change of life or circumstances, not easily capable of explanation, except on the hypothesis of the possession of the fruits of crime; as, for instance, where shortly after a larceny or robbery, or the suspicious death or disappearance of a person in good circumstances, a person previously poor is found in the possession of considerable wealth; (*p*) and the like. The civil law held, that the suddenly becoming rich was not even *prima facie* evidence of dishonesty against a guardian; (*q*) and in our criminal courts it is not, when standing alone, any ground for putting a party on his defense. (*r*)

**460. V. Evasion of justice.**—By “Evasion of justice” is meant the doing some act indicative of a desire to avoid, or stifle judicial inquiry into an offense, of which the party doing the act is accused or suspected. Such desire may be evidenced by his flying

(*p*) See Burdock's Case, Appendix,  
No. 1, Case 2.

(*q*) Cod. lib. 5, tit. 51, l. 10.  
(*r*) 2 Ev. Poth. 345.

<sup>1</sup> The evidence arising from threats is to be used with great caution. See *Jim v. State*, 5 Humph. 146; *Commonwealth v. Burgess*, 2 Va. Cas. 484; *Commonwealth v. Smith*, 7 Smith's Laws, 697; *Resp. v. Mulatto Bob*, 4 Dallas, 146.

from the country or neighborhood ; removing himself, his family, or his goods to another place ; keeping concealed, &c. To these must be added the kindred acts of bribing or tampering with officers of justice, to induce them to permit escape, suppress evidence, &c. All these afford a presumption of guilt, more or less cogent, according to circumstances.

461. The fact that about the time of the commission of an offense, a person accused or suspected of it left the country, changed his home, &c., is only presumptive evidence of an intention to escape being rendered amenable to justice for that offense—a man may change his abode for health, business, or pleasure. In order to estimate the weight due to this presumption, it is most important to inquire into the party's general mode of life. In the case of a mariner, carrier, itinerant vender, or itinerant handicraft, the inference of guilt from change of place might amount to little or nothing. (s) Moreover, the object in absconding might be to avoid civil process, or inquiry into some other offense. (t)

462. But even the clearest proof, that the accused absented himself to avoid the actual charge against him, although a strong circumstance, is by no means conclusive evidence of guilt. Many men are naturally of weak nerve, and under certain circumstances, the most innocent person may deem a trial too great a risk to encounter. He may be aware that a number of suspicious, though, inconclusive facts, will be adduced in evidence against him ; he may feel his inability to procure legal advice to conduct his defense, or to bring witnesses from a distance to establish it ; he may be fully assured that powerful or wealthy

(s) 3 Benth. Jud. Ev. 176.

(t) 1d. 180.

individuals have resolved on his ruin, or that witnesses have been suborned to bear false testimony against him. Add to all this that, even under the best regulated judicial system, more or less vexation must necessarily be experienced by all persons who are made the subject of criminal charges, which vexation it may have been the object of the party to elude by concealment, with the intention of surrendering himself into the hands of justice when the time for trial should arrive. (*u*) These considerations are entitled to weight at all times, and in all places ; but in addition to them the nature and character of the tribunal before which, and of the administration of justice in the country where the trial is to take place, must never be lost sight of. To say nothing of those cases where the tribunal lies under just suspicion, or positive corruption, partiality, or prejudice, the principles on which it avowedly acts may in themselves be sufficient to deter any man from voluntarily placing himself in its power. In the case, for instance, of those tribunals which act on the maxims, "*In atrocissimis leviores conjecturæ sufficiunt, et licet judici jura transgredi :*" (*x*) "*Hæreseos suspectus, tanquam hæreticus condemnatur, nisi omnem suspicionem excusserit ;*" (*y*) or of others which, on slight evidence, would, in order to extract confession, torture a suspected man so as perhaps to disable him for life ; (*z*) or of others acting

(*u*) For the purpose of computing the average duration of a penal suit in France, the thirty volumes, in closely printed 12mo, of the *Causes Célèbres* were examined. It was not in every instance that the duration of the suit could be ascertained : but, in those in which it could, the average duration turned out to be *six* years. (3 Benth. Jud. Ev. 174.) In this country, in

places where there is no winter assize, a party committed in the month of September for a serious felony, can not be tried until the following February or March.

(*x*) Introd. pt. 2, § 49, note (*g*).

(*y*) Devot. Inst. Canon. lib. 3, tit. 9, § 31, Ed. 1852.

(*z*) See Introd. pt. 2, § 70, note (*l*), also § 69, and any treatise on the

on the principle laid down by certain eminent moralists, that it is justifiable to deliver up to capital punishment individuals whose guilt is not indisputably proved, on the ground that those who fall by a mistaken sentence may be considered as falling for their country, (*a*)—is it matter of wonder that innocent persons should fly to avoid the impending danger? Would it not be more surprising to find any waiting to meet the course of justice? (*b*)

463. But there are other considerations, independent of tribunals or their practice, which might powerfully influence a man to seek to avoid being tried for a suspected crime. The case may have attracted much public attention, and a strong popular feeling may prevail against the supposed criminal. And here the occasional misconduct of the public press must not be overlooked. When facts have come to light, indicating the probable commission of some crime conspicuous for its peculiarity or atrocity, the press of this country has too often forgotten the honorable position it ought to occupy, and the fearful responsibility consequent on the abuse of its power. Under color of a horror of the crime, but more probably with the view of pandering to excited curiosity and morbid feeling, a course has been taken, calculated to deprive of all chance of a fair trial, the unfortunate individual who was suspected of it. For weeks or months previous, his conduct and character have been made the continual subject of condemnatory discussion in the public prints, and in all places within the sphere of their influence.

practice of the civil law in criminal cases.

(*a*) See *Intron.* pt. 2, § 49, note (*q*).

(*b*) What a picture of the state of criminal procedure in the country

where he lived, is presented by the declaration of the French lawyer, that he would fly if accused of stealing the steeples of Notre Dame! 3 *1*enth Jud. Ev. 175.

Circumstantial descriptions of the way in which the crime was committed, and sometimes actual delineations of it, with the accused represented in the very act; elaborate histories of his past life, in which he has been spoken of as guilty of crimes innumerable; minute accounts of his conduct in the retirement of his cell, and while under examination; and expressions of wonder and rage, that he has had the audacity to withhold a confession of his guilt, have been daily and hourly poured forth. In one case, while certain parties were awaiting their trial for murder, the whole scene of the murder, of which, of course, they were assumed to be the perpetrators, was dramatized, and represented to a metropolitan audience. (c) The necessary consequence was that a firm belief of the guilt of the accused was imperceptibly worked into the minds of the better portion of society, while the rest was inflamed to the highest pitch of excitement and exasperation against him. In the midst of all this the trial took place, and, under such circumstances, it could be little better than a mockery. The judge and jury could hardly be considered, even by themselves, as individuals chosen to decide impartially on the guilt or innocence of the accused; but must rather have been expected to be formal registrars of a verdict of condemnation, already iniquitously given against him by the community, before he was heard in his defense. It is gratifying to be able to add that the misconduct here spoken of has, of late years, been greatly on the decline.

**464.** We must not, however, dismiss this subject,

(c) On the 7th of January, 1824, John Thurtell and Joseph Hunt were tried and convicted on unquestionable evidence for the murder of William Weare, on the 17th of October, 1823.

The murder was dramatized, and the piece played at the Surrey Theatre on the 17th of November preceding the trial.



without observing that cases sometimes occur, where an offense is committed under the prospect of impunity, offered by a change of place resolved on from other motives.

**465.** Few things distinguish an enlightened from a rude and barbarous system of judicature, more than the way in which they deal with evidence. The former weighs evidence ; the latter, conscious perhaps of its inability to do so with effect, or careless of the consequences of error, sometimes rejects the evidence altogether, and at others converts certain pieces of evidence into rules of law, by investing them with conclusive effect, merely because their probative force has in general been found to be considerable. Our ancestors, observing that guilty persons commonly fled from justice, adopted the hasty conclusion that it was only the guilty who did so, according to the maxim, ‘ *Fatetur facinus qui fugit iudicium.*’ (*d*) Under the old law, a man who fled to avoid being tried for treason or felony, forfeited all his goods and chattels, even though he were acquitted ; (*e*) and in such cases the jury were charged to inquire, not only whether the accused were guilty of the offense, but also whether he had fled for it, and if so what goods and chattels he had. This practice was not formally abolished until he 7 & 8 Geo. 4, c. 28, s. 5. Nor was the notion peculiar to the English law. We find traces of it among the earlier civilians, who lay down, “ *Reus per fugam sui, pene accusator existit.*” (*f*) Among the later

(*d*) 5 Co. 109 b ; 11 Co. 60 b ; Jenk. Cent. 1 Cas. 80.

(*e*) Co. Litt. 373 a and b ; 5 Co. 109 b ; 19 Ho. St. Tr. 1098. According to some authorities, indeed, this forfeiture was inflicted on the ground

that the flight was a contempt of the law, and a substantive crime in itself, Plowd. 262 ; 19 Ho. St. Tr. 1098.

(*f*) Voet. ad Pand. lib. 22, tit. 3. n 5 ; Novel. 53, cap. 4.

civilians, (*g*) as well as among ourselves in modern times, more correct views have prevailed; and the evasion of justice seems now nearly, if not altogether reduced to its true place in the administration of the criminal law, namely, that of a circumstance—a fact which it is always of importance to take into consideration; and which, combined with others, may supply the most satisfactory proof of guilt, although, like any other piece of presumptive evidence, it is equally absurd and dangerous to invest with infallibility.

466. VI. Fear indicated by passive deportment, &c.—The emotion of fear, indicated by passive deportment when a party is accused, or perceives that he is suspected of an offense, is sometimes relied on as a criminative circumstance. The following physical systems may be indicative of fear:—"Blushing, paleness, trembling, fainting, sweating, involuntary evacuations, weeping, sighing, distortions of the countenance, sobbing, starting, pacing, exclamation, hesitation, stammering, faltering of the voice," &c.; (*h*) and, as the probative force of each of these depends on the correctness of the inference, that the symptom has been caused by fear of detection of the offense imputed, two classes of infirmative hypotheses naturally present themselves. 1st. The emotion of fear may not be present in the mind of the individual. Several of the above symptoms are indicative of disease, and characteristic of other emotions, such as surprise, grief, anger, &c. With respect to the first, for instance, "blushing," the flush of fever and the glow of insulted innocence are quite as common as the crimson of guilt. 2ndly. The emotion of fear, even if actually present, although presumptive

(*g*) Mascard. de Prob. Concl. 499; in loc. cit.  
Matth. de Prob. cap. 2, n. 69; Voet. (*h*) 3 Benth. Jud. Ev. 153.

is by no means conclusive evidence of guilt of the offense imputed. The alarm may be occasioned by the consciousness of another crime, committed either by the party himself, or by others connected with him by some tie of sympathy, on whom judicial inquiry may bring down suspicion or punishment ; (*i*) or even by the recollection of a fact, in consequence of which, without any delinquency at all, vexation has been, or is likely to be produced to him or them. (*k*) So, the apprehension of condemnation and punishment though innocent, or of vexation and annoyance from prosecution, is a circumstance the weight of which, like that of the evasion of justice, depends very considerably on the character of the tribunal before which, and the forms of criminal procedure in the country where the trial is to take place. (*l*) Lastly, the rare, though no doubt possible, case of the falsity of the supposed self-criminative recollection. (*m*) *E. g.* a habitual thief is taken into custody for a theft ; that he should show symptoms of fear is natural enough ; and confounding one of his exploits with another, he may (especially if the time of the supposed offense be very remote) imagine himself to recollect a theft, in which, in truth, he bore no part. (*n*)

Closely allied to this subject is the inference of the existence of alarm, and through it of delinquency, derived from confusion of mind ; as expressed in the countenance, or by discourse, or conduct. (*o*) This, however, like the former, is subject to the infirmative hypotheses, 1st. That the alarm may be caused by the apprehension of some other crime, or some disagreea-

(*i*) Id. 157.

(*k*) Id.

(*l*) *Supra*, § 462.

(*m*) 3 Benth. Jud. Ev. 157.

(*n*) Id. 158.

(*o*) Id. 149.

ble circumstance coming to light; (*p*) 2nd. Consciousness on the part of the accused or suspected person that, though innocent, appearances are against him. (*q*)

467. VII. Fear indicated by a desire for secrecy. —The presence of fear may be evidenced in another way, namely, by acts showing a desire for secrecy; such as doing in the dark what, but for the criminal design, would naturally have been done in the light; choosing a spot supposed to be out of the view of others, for doing that which, but for the criminal design, would naturally have been done in a place open to observation; disguising the person; taking measures to remove witnesses from the scene of the intended unlawful action, &c. (*s*) Acts such as these are, however, frequently capable of explanation. 1st. It is perfectly possible, that the design of the person seeking secrecy may be altogether innocent, at least so far as the criminal law is concerned. (*t*) The lovers of servants, for instance, are often mistaken for thieves, and vice versa. (*u*) 2ndly. The design, even if criminal, may be criminal with a different object and of a degree less culpable than that attributed; (*x*) as, for instance. where a man, with a view of making sport by alarming his neighbors dresses himself up to pass for a ghost. (*y*)

(*p*) There is a well-known case of a man, who being wrongly suspected of harboring a person accused of a state crime, his house and even his bed-chamber, as he was lying in bed, were searched by the officers of justice. He had at the moment in bed with him, a female, whose reputation would have been ruined by the disclosure; and confusion, more or less, he must have betrayed. His presence of mind saved

himself and her, by uncovering enough of her person to indicate the sex, without betraying the individual. See 3 Benth. Jud. Ev. 151 (note).

(*q*) 3 Benth. Jud. Ev. 151.

(*s*) 3 Benth. Jud. Ev. 160, 161.

(*t*) Id. 162.

(*u*) Id.

(*x*) 3 Benth. Jud. Ev. 162.

(*y*) Id. 163.

## PARAGRAPH

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468. The subject of the present section may fairly be termed the Romance of Jurisprudence, and is indeed one of the few parts of that matter-of-fact science in which it becomes necessary, under penalty of the gravest consequences, to guard against illusions of the imagination. Unfortunately for the interests of society, the true principles on which presumptive evidence rests, have not always been understood or adverted to by those entrusted with power; and the judicial histories of every country supply melancholy instances, where the safety of individuals has been sacrificed to the ignorance, haste, or misdirected zeal of judges and jurymen dealing with this mode of proof. The consequence has been that a prejudice has arisen against it, so that a declaration on the dangers of convicting on presumptive evidence, is ever sure of the ready ear of a popular assembly. Viewed either in a legislative or professional light, such an argument is scarcely deserving serious refutation. No form of judicial evidence is infallible—however strong in itself, the degree of assurance resulting from it amounts only to an indefinitely high degree of probability; (z) and perhaps as many erroneous condemnations have taken place on false or mistaken direct testimony, as on presumptive proof. (a) Indeed, the most unhappy

(z) See Introd. pt. 1, §§ 7 and 27; bk. 1, pt. 1, § 95.

(a) For cases of mistaken identity, see *infra*, ch. 6. On the other hand, as every one must be aware, positive direct testimony frequently has its

origin in willful falsehood. The most heinous offenses, murder not excepted, have occasionally been committed with the view of afterwards accusing innocent persons of them, in order to obtain a reward held out for the conviction.

instances are those where the tribunal has been deceived by suspicious circumstances, casual or forged, coupled with false direct testimony ; for in such cases the two species of evidence (though each is fallacious in itself) prop up each other. And, as in the most important transactions of life, in all the moral, and most of the physical sciences, we are compelled to rely almost exclusively on probable or presumptive reasoning, (*b*) it seems difficult to suggest why a higher degree of assurance should be required in judicial investigations, even were such assurance attainable.

469. But while we condemn this, perhaps not unnatural error, what must be said of one of an opposite kind, infinitely more mischievous because promulgated by authority which we are bound to respect,—namely, the setting presumptive evidence above all other modes of proof, and investing it with infallibility? Juries have been told from the bench, even in capital cases, that “where a violent presumption necessarily arises from circumstances, they are more convincing and satisfactory than any other kind of evidence, because facts can not lie.” (*c*) Numerous remarks might be made on this strange dogma ; the first of which that presents itself is, that the moment we talk of anything following as a necessary consequence from others, all idea of pre-

tion of offenders. At Dublin, in January, 1842, one John Delahunt was convicted and executed for an offense of this nature. See also *R. v. McDaniel and others*, O. B. Sess. 1755, reported in *Foster's C. L.* 121.

(*b*) Locke on the Human Understanding, bk. 4, ch. 14.

(*c*) Per Legge, B., in the case of *Mary Blandy*, 18 Ho. St. Tr. 1187.

See also, per Buller, J., in *Donellan's Case*, Warwick Sp. Ass. 1781. Report by Gurney ; per Mounteney, B., in *Annesley v. Earl of Anglesea*, 17 Ho. St. Tr. 1430 ; *Gilb. Evid.* 157, 4th Ed. ; *Paley's Moral and Political Philosophy*, bk. 6, ch. 9 ; and the *Works of Chancellor D'Aguesseau*, tom. 12, p. 647.

sumptive reasoning is at an end. (*d*) Secondly, that even assuming the truth of the assertion that facts or circumstances can not lie, still so long as witnesses and documents, by which the existence of those facts must be established, (*e*) can lie, or even honestly misrepresent, so long will it be impossible to arrive at infallible conclusions from circumstantial evidence. But, without dwelling on these considerations, look at the broad proposition, "Facts can not lie." Can they not, indeed? When, in order to effect the ruin of a poor servant, his box is opened with a false key, and a quantity of goods stolen from his master is deposited in it; or, where a man is found dead, with a bloody weapon lying beside him, which is proved to belong to a person with whom he has had a quarrel a short time before, and footmarks of that person are traced near the corpse; but the murder has in reality been committed by a third person who, owing a spite to both, put on the shoes of one of them and borrowed his weapon to kill the other, do not the circumstances lie—wickedly, cruelly lie. (*f*) There is every reason to fear that a blind reliance on the dictum, "Facts can not lie," has occasionally exercised a mischievous effect in the administration of justice.

**470.** In dealing with judicial evidence of all kinds, ignorance dogmatizes, science theorizes, sense judges. The right application of presumptive, as of other species of evidence, depends on the intelligence,

(*d*) See *supra*, § 468.

(*e*) Domat, *Lois Civiles*, pt. 1, liv. 3, tit. 6, *Préamb*; *Theory of Presumptive Proof*, pp. 23 and 28.

(*f*) A bad case of this latter kind is given in the *Theory of Presumptive Proof*, *Append. Case 10*. See also the case of Adrien Doué, 5 *Causes Célè-*

*bres*, 444, Ed. Richer, *Amsterd.* 1773; and *supra*, bk. 2, pt. 2, on *Real Evidence*. See also the story narrated by Cicero, *de Inv. lib.* 2, s. 4, cited Ram on *Facts*, 97, and the quotation from *Cymbeline* in *Goodeve on Evidence*, 43-4.

the honesty, and the firmness of tribunals. To convict, at least in capital cases, on the strength of a single circumstance, is always dangerous; and it has been justly observed, that where the criminative facts of a presumptive nature are more numerous, most of the erroneous convictions which have taken place have arisen from relying too much on general appearances, when no inchoate act approaching the crime has been proved against the accused. (*g*)

471. But the stream, and even the source of justice, may be poisoned by causes irrespective of the imbecility of laws or the errors of tribunals. One of these, from the influence it has frequently exercised in capital cases, and especially when the proof against the accused has been presumptive, deserves particular attention. We allude to the prevalence of superstitious notions which, although much diminished by the march of enlightenment and civilization, is far from extinct. The days are, it is true, gone by when supernatural agency was allowed to supply chasms in a chain of proof; when persons were condemned to death on the supposed testimony of apparitions, (*h*) or because the

(*g*) Theory of Presumptive Proof, 58, 59.

(*h*) At a trial in 1754, for murder, before the Court of Justiciary in Scotland, two witnesses were allowed to swear to their having seen a ghost or spirit, which they said had told them where the body was to be found, and that the pannels (*i. e.*, the accused) were the murderers. Burnett's Crim. Law of Scotland, 529. See, also, the unfortunate case of John Miles, who, in some degree at least, owed his conviction for the murder of his friend, William Ridley, to the reports spread through the neighborhood that the house, the scene of the supposed mur-

der (for none had been committed in reality, the deceased having accidentally fallen into a deep privy, where no one thought of looking for him), was haunted, and that the ghost of the deceased had appeared to an old man and denounced Miles as his murderer. Theory of Presumptive Proof, Appendix, Case 5. In the American case of the Boorns, likewise, so late as 1819, it is mentioned that a person repeatedly dreamed of the murder, with great minuteness of circumstance, both in regard to the death and the concealment of the remains; but the innocence of the prisoners was fully established by the appearance of the



corpse bled at their touch ; (i) but the spirit of superstition is ever the same. There is a notion still very prevalent among the lower orders of society (though not by any means confined to them), that no person would venture to die with a lie in his mouth ; and consequently, that when a criminal awaiting his execution, especially a criminal who evinces religious feeling, makes a solemn protestation of his innocence, no alternative remains but to believe him, and that the tribunal by which he was condemned was either corrupt or mistaken. It is difficult to imagine a fallacy more dangerous to the peace of society than this. Conceding that such protestations are always deserving of attention from the executive, what is there to invest them with any conclusive effect, in opposition to a chain of presumptive evidence, the force of which falls short only of mathematical demonstration ? The criminal, it is argued, is standing on the confines of a future world. True ; but perhaps he does not believe in its existence. Take, however, the strongest case

party supposed to have been murdered.

1 Greenl. Ev. § 214, note (2), 7th Ed.

(i) Huberus, Præl. Jur. Civ. lib. 22, tit. 3, n. 15, when speaking of slight presumptions, says : " Huc etiam pertinet fama sive rumor, et fuga item fluxus sanguinis è cadavere, ad alicujus præsentiam, respectu cædis. Id enim ut aliquando dederit occasionem homicidæ detegendi, ita sæpè aliis causis, licet occultis, evenisse, legitur." See also Burnett, *ubi supra*. In this country, in the case of Mary Norkott and others, who were tried at the bar of the King's Bench, in the 4 Car. I. (1628-9), on an appeal of the murder of Jane Norkott, wife of one of the accused, two respectable clergymen swore that, the body having been

taken out of the grave and laid on the grass, thirty days after death, and one of the parties required to touch it, " the brow of the dead, which before was of a livid and carrion color, began to have a dew, or gentle sweat, arise on it, which increased by degrees, till the sweat ran down in drops on the face ; the brow turned to a lively and fresh color, and the deceased opened one of her eyes, and shut it again ; and this opening the eye was done three several times ; she likewise thrust out the ring or marriage finger three times, and pulled it in again ; and the finger dropped blood from it on the grass." 14 Ho. St. Tr. 1324, reported by Serjeant Maynard.

(k) See *infra*, chap 7

Suppose his faith undoubted, that he has attended most assiduously to every religious duty, and displayed, up to the very moment of execution, a becoming sense of contrition for past offenses in general; but that he solemnly declares his innocence of the crime for which he is about to suffer,—must he necessarily be believed? Is there nothing else to be taken into consideration? He reflects on the obloquy which an avowal of his guilt will bring on his family and connections, that its effect will be to expose them to the finger of scorn for generations to come, or, perhaps, to reduce them to poverty, or drive them to self-expatriation. With all this present to his mind we need not be astonished if a criminal, whose notions of morality were perhaps never very clear, should, particularly when regard for his own memory is taken into the account, delude himself into the belief that a false protestation of innocence, made to avert so much evil, is an offense of an extremely venial nature, if not an act deserving positive approbation. We must not forget the position in life and the character of the persons who commonly make these protestations, or expect them to see with the eyes of philosophy, the extent of the mischief which will inevitably result from a conviction in the public mind, that an innocent man has been sacrificed by a corrupt or mistaken sentence. The immediate benefits to themselves, their families or neighbors forms the boundary line of their vision, while the great interests of society are lost in a distant horizon. The judicial histories of all countries furnish examples of the most solemn denunciations of the unjustness of the court, or the perjury of the witnesses against them, made by criminals the blackness of whose deeds and the justice of whose condemnation no rational being could doubt, and when we recollect the numerous in-

stances which have occurred of persons making groundless confession of guilt, (*k*) we shall cease to be surprised at false asseverations of innocence.

(a) See *infra*, chap. 7.

## CHAPTER III.

## PRIMARY AND SECONDARY EVIDENCE.

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472. The exaction of original evidence is unquestionably one of the most marked features of English law. (a) And in the present chapter we propose to consider the application of this principle to the proof of

(a) See Introd. pt. 1, § 29, and bk. 1, pt. 1, §§ 87-9.

instruments and documents, which are sufficiently identified by description, and proximate to the issues raised, to be at least *prima facie* receivable in evidence. Such are said to be the "Primary evidence" of their own contents; and the term "Secondary evidence" is used to designate any derivative proof of them; such as memorials, copies, abstracts, recollections of persons who have read them, &c. It is a general and well-known rule, that no secondary evidence of a document can be received until an excuse, such as the law deems sufficient, is given for the non-production of the primary. Whether a proper foundation has been laid for the admission of secondary evidence, is to be determined by the judge, and if this depends on a disputed question of fact, he must decide it. (*b*)

473. And here a question presents itself which is alike important and embarrassing—is this principle confined to evidence *in causa*, or does it extend to evidence *extra causam*? The following questions were put by the House of Lords, and the following answers given by the judges during the proceedings against Queen Caroline, in 1820: (*c*)<sup>1</sup> "First, whether, in the courts below, a party, on cross-examination, would be allowed to represent in the statement of a question, the contents of a letter, and to ask the witness, whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked that witness, whether the witness wrote that letter, and his admitting that he wrote such letter?"<sup>2</sup> "Sec-

(*b*) *Supra*, bk. 1, pt. 1, § 82; Har- Elmes v. Ogle, 15 Jur. 180.  
vey v. Mitchell, 2 Moo. & R. 366; (*c*) 2 B. & B. 286-291.

<sup>1</sup> Causes Célèbres. Trial of Queen Caroline, N. Y., James Cockcroft & Co., 1874, vol. i. p. 368.

<sup>2</sup> *Id.*

only, Whether, when a letter is produced in the courts below, the court would allow a witness to be asked, upon showing the witness only a part of, or one or more lines of such letter and not the whole of it, whether he wrote such part or such one or more lines; and, in case the witness shall not admit that he did or did not write the same, the witness can be examined as to the contents of such letter?"<sup>1</sup> "Thirdly, Whether, when a witness is cross-examined, and, upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined in the courts below, whether he did not, in such letter, make statements such as the counsel shall, by questions addressed to the witness, inquire are or are not made therein; or whether the letter itself must be read as the evidence to manifest that such statements are or are not contained therein; and in what stage of the proceedings, according to the practice of the courts below, such letter could be required by counsel to be read, or be permitted by the court below to be read?"<sup>2</sup> The first of these questions the judges answered in the negative; on the ground that "The contents of every written paper are, according to the ordinary and well established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence; the proper course, therefore, is to ask the witness, whether or no that letter is of the handwriting of the witness. If the witness admits that it is of his or her handwriting, the cross-examining counsel may, at his proper season, read that letter as evidence, and, when the letter is produced, then the whole of the

<sup>1</sup> *Causes Célèbres. Trial of Queen Caroline, N. Y., James Cockroft & Co., 1874, vol. i. p. 369.*

<sup>2</sup> *Id. p. 375.*

letter is made evidence. One of the reasons for the rule requiring the production of written instruments is, in order that the court may be possessed of the whole. If the course, which is here proposed, should be followed, the cross-examining counsel may put the court in possession only of a part of the contents of the written paper ; and thus the court may never be in possession of the whole, though it may happen, that the whole, if produced, may have an effect very different from that which might be produced by a statement of a part."<sup>1</sup> The first part of the second question, namely, "Whether, when a letter is produced in the courts below, the court would allow a witness to be asked, upon showing the witness only a part of one or more lines of such letter, and not the whole of it, whether he wrote such part?" the judges thought should be answered by them in the affirmative in that form ;<sup>2</sup> but to the latter, "and in case the witness shall not admit that he did or did not write such part, whether he can be examined as to the contents of such letter," they answered in the negative, for the reasons already given, namely, that the paper itself is to be produced, in order that the whole may be seen, and the one part explained by the other.<sup>3</sup> To the first part of the third question Lord Chief Justice Abbot answered as follows :<sup>4</sup> "The judges are of opinion, in the case propounded, that the counsel can not, by questions addressed to the witness, inquire whether or no such statements are contained in the letter ; but, that the letter itself must be read to manifest whether such statements are or are not con-

<sup>1</sup> Causes Célèbres. Trial of Queen Caroline, N. Y., James Cockcroft & Co., 1874, vol. i. p. 369.

<sup>2</sup> Id. p. 370.

<sup>3</sup> Id.

<sup>4</sup> Id. p. 376.

tained in that letter. In delivering this opinion to your lordships, the judges do not conceive that they are presuming to offer to your lordships any new rule of evidence, now, for the first time, introduced by them ; but, that they found their opinions upon what, in their judgment, is a rule of evidence as old as any part of the common law of England, namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself, and not by parol evidence." To the latter part of the question he returned for answer, " the judges are of opinion, according to the ordinary rule of proceeding in the courts below, the letter is to be read as the evidence of the cross-examining counsel, as part of his evidence in his turn, after he shall have opened his case ; that that is the ordinary course ; but that, if the counsel who is cross-examining, suggests to the court that he wishes to have the letter read immediately, in order that he may, after the contents of that letter shall have been made known to the court, found certain questions upon the contents of that letter, to be propounded to the witness, which could not well or effectually be done without reading the letter itself, that becomes an excepted case in the courts below, and for the convenient administration of justice, the letter is permitted to be read at the suggestion of the counsel, but considering it, however, as part of the evidence of the counsel proposing it, and subject to all the consequences of having such letter considered as part of his evidence."<sup>1</sup>

The foregoing questions and answers were followed by this : " Whether, according to the established practice in the courts below, counsel cross-examining

<sup>1</sup> *Causes Célèbres.* Trial of Queen Caroline, N. Y., James Cockcroft & Co., 1874, vol. i. p. 376.



are entitled, if the counsel on the other side object to it, to ask a witness whether he has made representations of a particular nature, not specifying in his question whether the question refers to representations in writing or in words?"<sup>1</sup> Lord Chief Justice Abbott delivered the following answer of the judges: "The judges find a difficulty to give a distinct answer to the question thus proposed by your lordships, either in the affirmative or negative, inasmuch as we are not aware that there is, in the courts below, any established practice which we can state to your lordships, as distinctly referring to such a question propounded by counsel on cross-examination, as is here contained; that is, whether the counsel cross-examining are entitled to ask the witness whether he has made such representation; for it is not in the recollection of any one of us that such a question, in those words, namely, 'whether a witness has made such and such representation,' has at any time been asked of a witness. Questions, however, of a similar nature are frequently asked at *nisi prius*, referring rather to contracts and agreements, or to supposed contracts and agreements, than to declarations of the witness; as, for instance, a witness is often asked, whether there is an agreement for a certain price for a certain article,—an agreement for a certain definite time,—a warranty,—or other matter of that kind being a matter of contract: and, when a question of that kind has been asked at *nisi prius*, the ordinary course has been for the counsel on the other side, not to object to the question as a question that could not properly be put, but to interpose on his own behalf, another intermediate question: namely, to ask the witness whether the agreement referred to in the

<sup>1</sup> *Causes Célèbres. Trial of Queen Caroline*, N. Y., James Cockcroft & Co., 1874, vol. i. p. 470.

question originally proposed by the counsel on the other side, was, or was not in writing; and if the witness answers that it was in writing, then the inquiry is stopped, because the writing must be itself produced—My lords, therefore, although we can not answer your lordships' question distinctly in the affirmative or the negative, for the reason I have given, namely, the want of an established practice referring to such a question by counsel; yet, as we are all of opinion that the witness can not properly be asked, on cross-examination, whether he has written such a thing (the proper course being to put the writing into his hands, and ask him whether it be his writing), considering the question proposed to us by your lordships, with reference to that principle of law which requires the writing itself to be produced, and with reference to the course that ordinarily takes place on questions relating to contracts or agreements, we, each of us, think, that if such a question were propounded before us at *nisi prius*, and objected to, we should direct the counsel to separate the question into its parts. My lords, I find I have not expressed myself with the clearness I had wished, as to dividing the question into parts. I beg, therefore, to inform the House, that, by dividing the question into parts, I mean, that the counsel would be directed to ask whether the representation had been made in writing or by words. If he should ask, whether it had been made in writing, the counsel on the other side would object to the question; if he should ask whether it had been made by words, that is, whether the witness had said so and so, the counsel would undoubtedly have a right to put that question, and probably no objection would be made to it."¹

¹ *Causes Célèbres. Trial of Queen Caroline*, N. Y., James Cockcroft & Co., 1874, vol. i. p. 471.

474. The rule that an advocate who has a document in his possession shall not represent its contents to a witness, may possibly be defended on the ground, that whoever uses a document in a court of justice has no right to suppress any part of it, or prevent its speaking for itself; although the fitness of extending even this principle to evidence *extrà causam* is not beyond dispute. But whether a witness may be asked, with a view to test his memory or credit, if he has ever made a representation, not specifying whether verbal or written, or has written a letter, not saying to whom, when, or under what circumstances, in which representation or letter he has made statements inconsistent with the evidence given by him, in *causâ*, is a much larger question. It has been suggested that the above answers of the judges have not resolved this point in the negative, and that they were all based on the assumption that the letter was in the possession of the cross-examining counsel. (*e*) In practice, however, a different construction is put upon them; (*f*) and we should at once dismiss the subject, had not that practice been condemned by text writers on the law of evidence, (*g*) and the practice founded on them been recently modified by the legislature. (*h*) And here it may be doubted how far the proceedings

(*e*) Ph. & Am. Ev. 932.

(*f*) *Macdonnell v. Evans*, 11 C. B. 930. In *Henman v. Lester*, 12 C. B., N. S. 776, 789, it was said by Willes, J., that the rules laid down in *Macdonnell v. Evans* and *The Queen's case*, were confined to cases in which the document would have been evidence upon the issue, or to contradict the witness if he had answered in a particular way; or in which the precise terms and language of the document were necessary to be referred to,

in order to answer the question. And it was held by Willes and Keating, JJ., Byles, J., *dissentiente*, that the defendant might be asked in cross-examination, whether, in a previous proceeding in a county court, there had not been a verdict against him; although it was objected that this ought to be proved by the record of the verdict itself.

(*g*) Ph. & Am. Ev. 931 *et seq.*; Stark. Ev. 221-227, 4th Ed.; Tayl Evid. § 1301, 4th ed.

(*h*) See *infra*.

in Queen Caroline's case are binding on tribunals, the answers of the judges to the House of Lords having no binding force *per se* ; and although in that case the House adopted and acted on those answers, it was not sitting judicially, but with a view to legislation, which finally proved abortive.

475. It can hardly escape notice that throughout the answers of the judges on the occasion in question, "written instrument" and "document" are assumed to be convertible terms—a fallacy which has led to more errors than one. A letter is not, at least in general, a written instrument ; and therefore taking the maxim of the common law to be as stated by Abbott, C. J., a letter does not fall within its meaning. But is it true as a historical fact, that "it is a rule of evidence as old as any part of the common law of England, that the contents of a written instrument" (*à fortiori* the contents of a written document not coming within the description of an instrument), "if it be in existence, are to be proved by that instrument" (or document) "itself, and not by *parol* evidence" ? And if this be so, is "*parol* evidence" here to be understood as comprehending every form of verbal, derivative, and extrinsic evidence ? And is it further true that the rule has at every period of our legal history been applied to evidence *extrà causam* ? and did the judges in Queen Caroline's case mean to convey this idea when they spoke of how the contents of a written instrument were to be proved ? It would be difficult either to prove or disprove directly, what was the practice in former times in this respect relative to evidence *extrà causam*, so much of our actual law of evidence being of comparatively modern growth, and our ancient books affording very slender information as to what questions might be put in cross-examination as

distinguished from examination-in-chief. But it is by no means clear that, even in this latter case, our ancestors extended the principle requiring primary proof beyond records, deeds, and perhaps written instruments in general. The reasons given by the old lawyers for rejecting derivative or extrinsic evidence, have manifest reference to such, (*i*) while all other documents seem to have been considered as mere "parol." And this view seems supported by the traces of the ancient practice which have come down to us. In the State Trials we constantly find the contents of documents given by witnesses from recollection; (*k*) but then the circumstance that those are the reports of state prosecutions, during very excited times, detracts from their value as accurate representations of the ordinary practice of the period. It is, however, tolerably certain that, so late at least as the latter end of the sixteenth century, all other forms of derivative evidence, such as hearsay, &c., were received as evidence in causa, their weakness being only matter of observation to the jury. (*l*) Now it seems improbable that, while hearsay evidence was receivable in chief within three centuries of our own times, a witness could not, from the earliest period of English law, be asked in cross-examination either the contents of the most ordinary document, or whether he ever made a representation of some particular fact, because by possibility it might turn out that he had not done so verbally.<sup>1</sup>

**476.** In dealing with this subject, much reliance is commonly placed on an analogy drawn from the rule of pleading which, previous to the 15 & 16 Vict. c. 76,

(*i*) See bk. 2, pt. 3.

(*l*) Bk. 1, pt. 2, §§ 112, 114.

(*k*) Bk. 1, pt. 2, § 115.

<sup>1</sup> See *ante*, vol. i., note 1, p. 399, *et seq.*

s. 55, required profert to be made of deeds and some other species of writings. This seems founded chiefly on Dr. Leyfield's case, (*m*) where it is stated that, "the reason that deeds being so pleaded shall be showed to the court, is, that to every deed two things are requisite and necessary; the one, that it be sufficient in law; and that is called the legal part, because the judgment of that belongs to the judges of the law; the other concerns matter of fact, sc. if it be sealed and delivered as a deed; and the trial thereof belongs to the country. And therefore every deed ought to approve itself, and to be proved by others; approve itself upon its showing forth to the court in two manners. 1. As to the composition of the words to be sufficient in law, and the court shall judge that. 2. That it be not razed or interlined in material points or places, and upon that also in ancient time, the judges did judge, upon their view, the deed to be void, as appears in 7 E. 3, 57; 25 E. 3, 41; 41 E. 3, 10, &c.; but of late times the judges have left that to be tried by the jury, sc. if the razing or interlining was before the delivery. 3. That it may appear to the court and to the party, if it was upon condition, limitation, or with power of revocation, &c., to the intent that if there be a condition, limitation, or power of revocation in the deed, if the deed be poll, or if there wants a counterpart of the indenture, the other party may take advantage of the condition, limitation, or power of revocation, and therewith Litt. c. Conditions, f. 90, 91. 40 Ass. 34 agree. And these are the reasons of the law, that deeds pleaded in court, shall be showed forth to the court." It was accordingly held in that case, that the defendant was bound to make profert of the let-

ters patent on which he rested his justification of the trespass complained of ; but whether what follows the passage just quoted, is to be read as the language of the court or of the reporter, is not easy to say. " And therefore it appears, that it is dangerous to suffer any who by the law in pleading ought to show the deed itself to the court, upon the general issue to prove in evidence to a jury by witnesses, that there was such a deed which they have heard and read ; or to prove it by a copy ; for the viciousness, razures, or interlineations, or other imperfections in these cases, will not appear to the court : or peradventure the deed may be upon condition, limitation, with power of revocation ; and by this way truth and justice, and the true reason of the common law would be subverted. But yet in great and notorious extremities, as by casualty of fire, that all his evidences were burnt in his house, there if that should appear to the judges, they may, in favor of him who has so great a loss by fire, suffer him upon the general issue to prove the deed in evidence to the jury by witnesses, that affliction be not added to affliction : and if the jury find it, although it be not showed forth in evidence, it shall be good enough, as appears in 28 Ass. p. 3 , but in 12 Ass. p. 16, the judges would not suffer a deed to be given in evidence which was not showed forth to the jury. Vide 26 Ass. p. 2, the like." (n) . . . . " Also (o) the deed ought not

(n) The two cases from the book of Assizes will be found, on examination, to fall very far short of the general proposition which they are cited to support. The 26 Ass. pl. 2 is a little obscure ; but the 12 Ass. pl. 16 is as follows:—"Trove fuit per verdict d'assize, que les tenements fueront dones a B. et a R. per un chartre que voloit ceux p'roix, Dedi, etc. Et les defendants fueront les files B. et R.:

et le pl'e fitz B. d'une autre feme. Et pur ceo que garrant ne chiet pas en lour conis. que deveront faire le tail, et la chartre ne fuit pas monstre en evidence ne pled, agarde fuit que le fitz recover, &c., uncore les files pled que la terre fuit don en tail, etc. Quære, si lachart ust este monstre ; si la tail usteste e les files."

(o) 10 Co. 93a.

only, as hath been said, to approve itself, but it ought to be proved by others, sc. by witnesses, that it was sealed and delivered; for otherwise, although the fabric and composition of the deed be legal, yet without the other it is of no effect."

477. Although one object of proferret may have been to enable the court to judge, by inspection, of the sufficiency of the deed relied on, yet Serjeant Stephen, no mean authority on such matters, questions whether the practice originated in this view, and thinks that the producing the deed was only a compliance with the general rule of pleading, which requires all affirmative pleadings to be supported by an offer of some mode of proof. (*p*) In ancient times, when a cause turned on a deed, the witnesses to the deed acted in some degree as a jury, and were brought in by a process analogous to a jury process; (*q*) and the object of laying the deed before the court was to enable them to see whether it was sufficient in law if proved, and if so, to issue process to bring in the witnesses. In confirmation of this it is to be observed that, at least in general, no proferret was required of a document not falling within the technical definition of a deed, (*r*) however completely an action or defense might rest on it,—*e. g.* an agreement not under seal; (*s*) or however indispensable its production at the trial, as a bill of exchange. (*t*) And even of a deed no proferret was required, unless the party pleading claimed or justified under it; not even then unless he relied on its direct and intrinsic operation. (*u*)

(*p*) Steph. Plead. 485; and Append. note 68, 5th Ed.

(*q*) Co. Litt. 6 b; Bro. Abr. tit. Testmoignes.

(*r*) Steph. Plead. 483, 5th Ed.

(*s*) Id.

(*t*) See *Ramuz v. Crowe*, 1 Exch. 167; *Clay v. Crowe*, 8 Exch. 295; *Jungbluth v. Way*, 1 H. & N. 71; *Aranguren v. Scholfield*, Id. 494; 17 & 18 Vict. c. 125, s. 87.

(*u*) Steph. Plead. 484, 5th Ed.



478. But whatever value may be attributed to the analogy from the theory of profert, there are other analogies much more to the purpose the other way. All other forms of derivative and remote evidence, such as hearsay, *res inter alios gestæ*, opinion evidence, and the like may, in most instances at least, be used to test the credit of witnesses; and even the judges in Queen Caroline's case concede, that a witness may be asked whether he ever made a verbal representation inconsistent with the evidence he has already given. Now, as it is indisputable that if that verbal representation were made to a third party it would not be evidence-in-chief, why is it evidence on cross-examination? The answer is obvious—that if the witness were untruly to deny having given a certain account of the transaction to which he has deposed, it would show a defect either in his memory or in his honesty; but does not this apply a fortiori to a statement reduced to writing, seeing that a man is less likely to forget what he has taken the pains to write down? Then it is said, a portion of the writing might be suppressed, so that the court and jury would not see the whole of it; but this argument would exclude the verbal representation; for this latter may have been made in a conversation part of which is suppressed, and the whole of which taken together (the rest, be it observed, can be retracted on re-examination, or given by the witness himself in the way of explanation), would give an entirely different color to the matter. By requiring the document containing the supposed contradiction, to be put into the hands of the witness in the first instance, the great principle of cross-examination is sacrificed at once. When a man gives certain evidence, and the object is to show that he has on a former occasion given some different account, con-

mon sense tells us that the way of bringing about a contradiction is to ask him if he has ever done so ; in order that he may have no intimation of the time, place, or circumstances alluded to, or consequently of what means are available to contradict and discredit him. Yet, according to the practice under the resolutions in Queen Caroline's case, if the witness had taken the precaution to reduce his previous statement to writing, the writing must be put into his hands, accompanied by the question whether he wrote it ; thus giving him full warning of the danger he had to avoid, and full opportunity of shaping his answers to meet it.

479. The principles laid down by the judges in Queen Caroline's case were rather extensively applied. After the passing of the 6 & 7 Will. 4, c. 114, which allowed prisoners on trial for felony to make their full defense by counsel, twelve of the judges, having assembled to choose the spring circuits of 1837, agreed to the following among other resolutions : (*x*)

" 1. Where a witness for the crown has made a deposition before a magistrate, he can not, upon his cross-examination by the prisoner's counsel, be asked whether he did or did not, in his deposition, make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein ; and such deposition must be read as part of the evidence of the cross-examining counsel.

" 2. After such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness, as to any supposed contradiction or variance between the testimony of the witness in court and his former deposition ; after which the counsel for the

prosecution may re-examine the witness, and, after the prisoner's counsel has addressed the jury, will be entitled to the reply. And in case the counsel for the prisoner comments on any supposed variance or contradiction, without having read the deposition, the court may direct it to be read, and the counsel for the prosecution will be entitled to rely upon it.

"3. The witness can not, in cross-examination, be compelled to answer, whether he did or did not make such or such a statement before the magistrate, until after his deposition has been read, and it appears that it contains no mention of such statement. In that event the counsel for the prisoner may proceed with his cross-examination: and if the witness admits such statement to have been made, he may comment upon such omission, or upon the effect of it upon the other part of his testimony; or if the witness denies that he made such a statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event, the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply."

480. Although these resolutions were not binding per se, not being the decision of a court in a judicial proceeding, they were followed in practice. And in order to prevent any evasion of them it was held, that a witness could not be asked on cross-examination, if he had ever made a statement inconsistent with his evidence-in-chief; but that the question must be guarded with the saving clause, that the party interrogating was not referring to what might have taken place before the committing magistrate, (y) or coroner (z) as the case might be. The anticipating possible

(y) *R. v. Shellard*, 9 C. & P. 277.

(z) *R. v. Holden*, 8 C. & P. 606.

objections has been truly designated by C. J. Hale "leaping before one comes to the stile." (*a*) Suppose the witness instead of making the inconsistent statement on his examination before the committing magistrate or coroner, had made it by matter of record, or by deed, or even by letter, his parol account of it would, according to Queen Caroline's case, be inadmissible; still it was not thought necessary, to require the cross-examining counsel to negative these various hypotheses by the mode of putting his questions. Another question had also arisen. Although a witness could not be asked what he said before the committing magistrate, unless either his deposition was put in evidence, or it was proved that the testimony given by him on that occasion was not taken down in writing; if the witness had signed the deposition so made by him, might a cross-examining counsel at the trial, put it into his hand as a memorandum to refresh his memory, and ask him if, after having read it, he persisted in the evidence given by him in chief? This course was allowed in several instances, (*b*) but was disallowed by some judges, (*c*) and disapproved by others; (*d*) and finally by the Court of Criminal Appeal. (*e*)

481. The answers of the judges in Queen Caroline's case, on which we have been commenting,—opposed as they were, to the most elementary principles of evidence,—having for years been denounced by writers on the subject, and latterly by the Common Law Commissioners of 1850, (*f*) at length received the condemnation of

(*a*) 1 Ventr. 217.

(*b*) R. v. Edwards, 8 C. & P. 31; R. v. Tooker, and R. v. Wilson, Salop Sp. Ass. 1849, ex relatione; R. v. Newton, 2 Ph. Ev. 516, 10th Ed.; R. v. Barnet, 4 Cox, Cr. Ca. 269.

(*c*) Per Patteson, J., in R. v. Newton,

15 L. T. 26; per Parke, B., in R. v. Lang, Kingst. Sp. Ass. 1851, MS.

(*d*) See R. v. Matthews, 4 Cox, Cr. Ca. 93.

(*e*) R. v. Ford, 2 Den. C. C. 245; 5 Cox, Cr. Ca. 184; 3 Car. & K. 113.

(*f*) Second Report, p. 20.

the legislature. The 17 & 18 Vict., c. 125, s. 24, following almost verbatim the recommendation of those commissioners, enacts: "A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit." By sect. 103, the enactments in this section are extended to every court of civil judicature in England and Ireland; and 28 Vict. c. 18, sects. 1 & 5, extends them to criminal cases.

482. It has been already stated, that when the absence of the primary source of evidence has been accounted for, secondary evidence is receivable. (*g*)<sup>1</sup> The excuses which the law allows for dispensing with primary evidence are, that the document has been destroyed or lost,<sup>2</sup> or that it is in the possession of the

(*g*) *Supra*, § 472. "Quumque ex ea definitione adpareat, instrumenta rerum gestarum fidei ac memoriæ causâ confici: facile patet, eis amissis, jus non expirare, nec ullam obliga-

tionem perimi, dum alia supersit probandi ratio;" Heinec. ad Pand. pars 4, § 133. See also Mascard. de Prob. Concl. 480, n. 4.

<sup>1</sup> See *ante*, vol. i., p. 399, note 1, *et seq.*

<sup>2</sup> That is to say, after sufficient search has been made. *Davis v. Spooner*, 3 Pick. 284; *Dennis v. Brewster*, 7 Gray (Mass.) 351; *Rush v. Whitney*, 4 Mich. 495; *Rutland, &c. R. Co. v. Thrall*, 35 Vt. 536; *Haywood, &c. Plank Road Co. v. Bryan*, 6 Jones (N. C.) L. 82; *Cheatham v. Riddle*, 8 Tex. 162. A party is not allowed to produce secondary evidence until a bona fide and diligent search has been un-

adversary, who does not produce it after due notice calling on him to do so; or in that of a party privileged to withhold it, who insists on his privilege; or who is out of the jurisdiction of the court, and consequently can not be compelled to produce it. Whether

successfully made for the lost instrument, in the place where it was most likely to be found. *Meek v. Spencer*, 8 Ind. 118. As to what will and will not be a sufficient search, see *post*, note 1, p. 814; and consult also *Murray v. Buchanan*, 7 Blackf. (Ind.) 549; *Mullikin v. Boyce*, 1 Gill (Md.) 60; *Glenn v. Rogers*, 3 Md. 312; *Doe v. McCaleb*, 3 Miss. (2 How.) 756; *Parke v. Bird*, 3 Pa. St. 360; *Vaulx v. Merriwether*, 2 Sneed. (Tenn.) 683; *Wade v. Work*, 13 Tex. 482; *Royalton v. Turnpike Co.*, 14 Vt. 311; *Fletcher v. Jackson*, 23 Id. 581; *Porgnaid v. Smith*, 8 Pick. (Mass.) 272; *Dan v. Brown*, 4 Cow. (N. Y.) 483; *Jackson v. Betts*, 6 Id. 377; 9 Id. 208; *Dreisbach v. Birger*, 6 Watts & S. (Pa.) 564; *S. P. Cook v. Hunt*, 24 Ill. 535; *Holbrook v. School Trustees*, 28 Id. 187; *Dickerson v. Talbot*, 14 B. Mon. (Ky.) 60; *Sellers v. Carpenter*, 33 Me. 485; *Kidder v. Blaisdall*, 45 Id. 461; *Barton v. Munian*, 27 Mo. 235; *Jackson v. Hasbrouck*, 13 Johns. (N. Y.) 192; *Jackson v. Frier*, 16 Id. 192; *Jackson v. Root*, 18 Id. 60; see as to the testimony required from an attorney who had mislaid papers, *Hatch v. Carpenter*, 9 Gray (Mass.) 271; and of an agent, *Bank of North America v. Embury*, 33 Barb. 323.

It was held in Vermont that the court will not presume that a deed of lands has been recorded, and require the records to be searched before admitting parol evidence of a deed. *Mattocks v. Stearns*, 9 Vt. 326; but see directly the contrary held in *Stow v. People*, 25 Ill. 81. It is the duty of a sheriff, after levying under a tax execution, to return it to the office of the solicitor-general, and it is to be presumed that he did this, and inquiry for it must be made at such office before secondary evidence of its contents can be admissible. *Davenport v. Harris*, 27 Ga. 68. Secondary proof as to the want of service of summons can not be admitted, before an inquiry is made of the present magistrate for the original papers. It is a fair presumption that all the papers appertaining to the office will be found in the possession of the last incumbent. *Adams v. Fitzgerald*, 14 Ga. 36; and see *Carr v. Miner*, 42 Ill. 179; *Little v. Indianapolis*, 13 Ind. 364; *Simpson v. Norton*, 45 Me. 281.

Secondary evidence of the contents of letters, will not be

a sufficient foundation has been laid for admitting secondary evidence, is often a matter of nicety ; and depends on whether sufficient proof has been given of the destruction or loss of the document ; whether a notice to produce is required—as in many cases the proceedings amount to constructive notice, and in

permitted when no special search has been made for the originals, because an attorney in the case and a witness each supposed that the other had the letters and would bring them, to the trial ; *Simpson v. Dall*, 3 Wall. 460 ; though copies of letters written by the seconds engaged in a duel may be introduced, when it is shown that the originals were last seen in the possession of an officer of the United States army, who is now absent on duty. *Moody v. Commonwealth*, 4 Metc. (Ky.) 1. But where an instrument has never been in the custody or control of a party wishing to use it, and is of such character that the law will not presume his control thereof, he will not be required to show a diligent search among his papers before giving parol evidence of its contents. *Wells v. Miller*, 37 Ill. 276.

Proof of a loss of an account book of original entries, not showing who last had possession of the book, or any bona fide and diligent search for it, will be insufficient to authorize secondary evidence of its contents, although, if no objection be taken, such secondary evidence may be allowed. *Caulfield v. Sanders*, 17 Cal. 500. The contents of a lost deed may be proved, on proof of its existence and loss ; but diligent search must first be made in the proper custody. *Armstrong v. Timmons*, 3 Har. (Del.) 342. Secondary evidence of instruments has been held admissible where articles of partnership were lost. *Perry v. Randolph*, 14 Miss. (6 Smed. & M.) 335. Where a forged instrument, on which an indictment is pending, has been lost. *Commonwealth v. Snell*, 3 Mass. 82. Of the mutilated part of a paper. *Fullis v. Griffith*, Wright (Ohio) 303. Of the contents of a lost agreement ; although founded entirely on memoranda made in the loser's private docket at the time of receiving it, and without his independent recollection. *Morrison v. Chapin*, 97 Mass. 72. Of deeds ; where copies are made by disinterested persons, of good character, and under circumstances that create no imputation of fraud ; where the original is proved to be lost. *Allen v. Parish*, 3 Ohio, 107, &c., &c.

others notice to produce is dispensed with by statute, (*h*) and if so, whether the notice given is sufficient in its terms, and has been given in proper time, &c. There are, however, some general principles which should always be borne in mind. First. Whether sufficient search has been made for a document, depends much on its nature and the circumstances of the case, (*i*)<sup>1</sup> as a useless document may be presumed

(*h*) E. g. 17 & 18 Vict. c. 104, s. 165. 319; *Richards v. Lewis*, 15 Jur. 512;

(*i*) R. v. East Farleigh, 6 D. & Ryl. R. v. Braintree, 1 E. & E. 51; *Quilter* 147; *Gathercole v. Miall*, 15 M. & W. v. *Jorfs*, 14 C. B., N. S. 747.

<sup>1</sup> Due diligence in the search for a subscribing witness to a paper may be, inquiry at the place where he was last heard of. *Cooké v. Woodrow*, 5 Cranch, 13; and see *Jones v. Scott*, 2 Ala. 58. To authorize secondary evidence of the contents of an execution, issued by a justice of the peace, it is sufficient to show, by the justice, that he can not, after diligent search, find it in his office, and has not seen it since the last term of the circuit court, when it went before the jury as evidence in another cause, accompanied by the testimony of the circuit clerk that he has made diligent but unsuccessful search for it among the files of his office containing the trial papers of the last term. *Johnson v. Powel*, 30 Ala. 113. Much less diligence in searching for a paper, before offering secondary evidence of its contents, will be required when the paper in question belongs to the adversary, than when it belongs to the party offering the testimony. *Desnoyer v. McDonald*, 4 Minn. 515. To let in parol evidence of the contents of an execution, it is not necessary that the clerk's office should be searched for it by the clerk himself; but search by another, who has access, is sufficient. *Hill v. Fitzpatrick*, 6 Ala. 314.

It is sufficient if a defendant, when applied to for a deed, denies having it in his possession and expresses his belief that it is in the register's office, where an ineffectual search is made for it, and also in the office of a lawyer, who once had it in his possession. *Shields v. Byrd*, 15 Ala. 818. Where there is evidence that a written bill of sale has been in the possession of one or the other of two persons, it must be proved that both of them have searched for it and been unable to find it. *Patterson v. Keystone, &c., Co.*, 30 Cal. 360.

In case of a deed of ancient date, and such as would not probably be preserved a great length of time, as a bill of sale of



to have been lost or destroyed, on proof of a much less search, and after a much shorter time, than an important one.<sup>1</sup> This subject is well illustrated in the

slaves, inquiry of persons who were supposed to know of it, was held sufficient proof of diligence to let in secondary evidence, in *Beall v. Dearing*, 7 Ala. 124. And if a person is deprived, by fraud, of the possession of written instruments which belong to him, secondary evidence of their contents is admissible. *Grimes v. Kimball*, 3 Allen (Mass.) 518.

In cases of an allegation of loss of an instrument, if suspicion is cast upon the fact of the loss, great diligence in the search must be shown; but in the absence of suspicion against the party asserting the loss, less diligence will be required. *Phenix Ins. Co. v. Taylor*, 5 Minn. 492; and see *Pickard v. Bailey*, 26 N. H. (6 Fost.) 152; *Kelsey v. Hanmer*, 18 Conn. 311; *Leland v. Cameron*, 31 N. Y. 115. Search by the last person known to have had possession of the paper (1 *Kemphill v. McClernans*, 24 Pa. St. 367); or by its proper custodian, unless traced to other hands (*Groff v. Pittsburg, &c. R. R.*, 31 Pa. St. 489); or in the place where it was most likely to be found (*Drake v. Ramsey*, 3 Rich. (S. C.) 37; *Birchfield v. Bonham*, 2 Spears (N. C.) 62); or proof that it was last seen in possession of a person without the jurisdiction of the court (*Clifton v. Lilley*, 12 Tex. 130; *Mordecai v. Beall*, 8 Port. (Ala.) 529).

Testimony of the clerk of a court that he had made diligent search for certain writs of execution belonging to the files of his office, and was unable to find them; *Stewart v. Connor*, 9 Ala. 803; or of a search for an appeal bond by the justice among the papers of his office, and in the county clerk's office, in the places where such bonds are usually kept, without success; *Teall v. Van Wyck*, 10 Barb. (N. Y.) 376; or by the grantee in a deed that he deposited it in the post-office directed to another, who testifies that he never received it, and that unsuccessful inquiry has been made at the office of deposit and delivery, and to the general post-office, by letter; *McRae v. Pegues*, 4 Ala. 158; or that an execution has been returned to the clerk's office, and that search has there been made for it, both by the clerk and the party's attorney; *Poe v. Dor-*

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<sup>1</sup> The degree of diligence which will be required, will be regulated by the value of the lost document. *Spaulding v. Bank of Susquehanna County*, 9 Pa. St. 28.

case of *Gathercole v. Miall*, (*j*) which was an action for a libel in a newspaper called "The Nonconformist." In order to prove the circulation of the libel, a witness

(*j*) 15 M. & W. 319.

rah, 20 Ala. 288; or that some years before he had received a letter from the plaintiff in the action, that he had searched for it among his papers and files of letters, and every other place where he could think it might be; and that he did not think he had seen it since he received it, and believed it was lost; *Meakim v. Anderson*, 11 Barb. 215; or that a witness that had left the papers at the shop of P., and that he went there to look for them, and saw P., who told him to look in his desk for them, and when he did so, and could not find them there, P. told him that he must have torn or burned them up; *Bridges v. Hyatt*, 2 Abb. (N. Y.) Pr. 449; or that a title-bond and receipts of payment, were last seen in the possession of the assignee in bankruptcy of their original holder, and that the successor of said assignee had been unable to procure them, after diligent inquiry, both of his predecessor and others. *Bohe v. Stickney*, 36 Ala. 482; or that a paper by law in the custody of a particular officer can not be found there, or accounted for by him. *Braintree v. Battles*, 6 Vt. 395; a search of half an hour for a paper in a lawyer's office where it was last known to be, without finding it; *Sturdevant v. Gaines*, 5 Ala. 435; or generally that the party had exhausted, to a reasonable degree, all the sources of information and means of discovery, naturally suggested by the nature of the case and accessible to the party; *Falsom v. Scott*, 6 Cal. 460; are sufficient to let in secondary evidence. But a hasty search, with a belief that a deed could be found if well looked for; *Hinds v. Evans*, 2 Spears (S. C.) 17; or the testimony of a clerk that he had the oversight of his master's papers, and had been unable to find the paper in question; *Hanson v. Kelly*, 38 Me. 456; or evidence that the library and papers of the party were destroyed by fire, except a few papers, accompanied by evidence of search for the particular paper; *Id.*; or where the evidence is such as to leave the mind in doubt whether, by a further search, books of record might not be found, *parol* evidence of their contents will not be admitted. *State v. Wayman*; 2 Gill & J. 254; or a search for a lost paper made more than a year before the trial, is not sufficient to justify the introduction of secondary evidence of the paper; *Porter v. Wilson*, 13 Pa. St. 641; or proof that the clerk of a court

was called who said he was president of a literary institution, which consisted of eighty members; that a number of "The Nonconformist" was brought to the institution, he did not know by whom, and left there gratuitously; that, about a fortnight afterwards, it was taken (as he supposed) out of the subscribers' room without his authority, and was never returned; that he had searched the room for it, but had not found it, and never knew who had it; and that he believed it had been lost or destroyed. Under these circumstances, the judge at Nisi Prius held that secondary evidence of the contents of the paper was admissible. A new trial having been moved for on the ground that this evidence was improperly received, the court held the ruling to be right. Alderson, B., in delivering his judgment, says: (*k*) "The question whether there has been a loss, and whether there has been sufficient search, must depend very much on the nature of the instrument searched for; and I put the case, in the course of the argument, of the back of a letter. It is quite clear a very slender search would be sufficient to show that a document of that description had been lost. If we were speaking of an envelope in which a letter had been received, and a person said, 'I have searched for it among my papers: I can not find it,' surely that would be sufficient. So, with respect to an old newspaper which had been at a public coffee-room, if the party who kept the public coffee-room had searched for it there, where it ought to be if in existence, and

(*k*) *Ib.* p. 335.

had searched the records and found no judgment in a certain case, are not sufficient to let in secondary evidence of the contents of written instruments. *Fox v. Lambson*, 8 N. J. L. (3 Hals.) 275. The degree of diligence which will be required will be regulated by the value of the lost document. *Spaulding v. Bank of Susquehanna County*, 9 Pa. St. 28.

where naturally he would find it, and says he supposes it has been taken away by some one, that seems to me to be amply sufficient. If he had said, 'I know it was taken away by A B,' then I should have said, you ought to go to A B, and see if A B has not got that which it is proved he took away; but if you have no proof that it was taken away by any individual at all, it seems to me to be a very unreasonable thing to require that you should go to all the members of the club, for the purpose of asking one more than another, whether he has taken it away, or kept it. I do not know where it would stop; when you once go to each of the members, then you must ask each of the servants, or wives, or children, of the members, and where will you stop? As it seems to me, the proper limit is where a reasonable person would be satisfied that they had bona fide endeavored to produce the document itself; and therefore I think it was reasonable to receive parol evidence of the contents of this newspaper." Secondly. According to some authorities, the object of a notice to produce is not merely to enable the party served to have the document in court; but also that he may be enabled to prepare evidence to explain, nullify, or confirm it. (*l*)<sup>1</sup> This notion has, however, been overruled, after argument and full review of the cases, by the Court of Exchequer, in a case of *Dwyer v. Collins*; (*m*) in which it was held that the sole object of such a notice is to enable the party to have the document in court to produce it if he likes; and if he does not, then to enable the opponent to give secondary evidence. "If," said Parke, B.,

(*l*) 1 Stark. Ev. 404, 3rd Ed.; Cook v. Hearn, 1 Moo. & R. 201; Exall v. Partridge, cited *arguendo* in *Doe d.* Wartney v. Grey, 1 Stark. 283. (*m*) 7 Exch. 639; 16 Jurist, 569.

<sup>1</sup> See *ante*, vol. i. note 1, page 398.

in delivering the judgment of the Court, "this (*i. e.* the reason suggested by the above authorities) be the true reason, the measure of the reasonable length of notice would not be the time necessary to procure the document, a comparatively simple inquiry, but the time necessary to procure evidence to explain or support it, a very complicated one, depending on the nature of the case and the document itself and its bearing on the cause."<sup>1</sup> And it was accordingly held in that case that where a party to a suit, or his attorney, has a document with him in court, he may be called on to produce it without previous notice; and in the event of his refusing, the opposite party may give secondary evidence.<sup>3</sup>

<sup>1</sup> And see *Dean v. Berder*, 15 Tex. 298; *United States v. Winchester*, 2 McLean, 135; *Farnsworth v. Sharp*, 5 Sneed. (Tenn.) 615; *Potier v. Barclay*, 15 Ala. 439; *Gunier v. Fall*, 15 Cal. 63; *Bank of South Carolina v. Brown*, *Dudley* (Ga.) 62; *Jefferson v. Conaway*, 5 Harr. 16; *State v. Lockwood*, 5 Blackf. (Ind.) 145; *Kimble v. Joslin*, *Overt* (Tenn.) 380; *Carlard v. Cunningham*, 37 Pa. St. 288; *Anderson Bridge Co. v. Applegate*, 13 Ind. 339; *Patterson v. Linden*, 14 Iowa, 414; *Dukey v. Ashby*, 2 A. K. Marsh. (Ky.) 11; *Williams v. Benton*, 12 La. Ann. 91; *Kennedy v. Fowke*, 5 Har. & J. 63; *Robertson v. Parks*, 3 Md. Ch. 65; *Commonwealth v. Emery*, 2 Gray (Mass.) 80; *Browne v. Boston*, Id. 494; *Lewire v. Dille*, 17 Mo. 64; *Farmers', &c. Bank v. Lonergan*, 21 Id. 46; *Ford v. Manson*, 4 Johns. 220; *Week v. Lyon*, 18 Barb. 530.

<sup>2</sup> If a writing be in court, no notice to produce it is necessary to let in parol evidence of its contents (*Dana v. Boyd*, 2 J. J. Marsh. 587); or where the writings are a proper matter of defense (*Kellar v. Savage*, 2 Me. 199); or if the party who would otherwise be notified offer to produce the papers, and fails to do so, without asking further time (*Dwinell v. Larra-see*, 38 Me. 464); or where the party is charged with their fraudulent possession (*Gray v. Kernahan*, 2 Mill. (S. C.) Const. 65; *Morgan v. Jones*, 24 Ga. 155; *State v. Mayberry*, 48 Me. 218; *S. P., Rose v. Lewis*, 10 Mich. 483; *Hart v. Robinett*, 5 Mo. 11; *Meally v. Greenough*, 25 N. H. (5 Fost.) 325; *Hammond v. Hopping*, 13 Wend. 505; *Hardin v. Kretsinger*, 17

483. The expression that secondary evidence of a document is receivable, must not be understood to mean that conjectural, or any other form of illegal evidence of it, will be received. Secondary evidence must be legitimate evidence, inferior to the primary solely in respect of its derivative character.<sup>1</sup> Thus, the copy of a copy of a destroyed or lost document is not receivable in evidence, even though, as it seems, the absence of the first copy has been satisfactorily explained. (n)<sup>2</sup> So, previous to the 14 & 15 Vict. c. 99, s. 2, where a document was lost, a copy of it made by the party to the suit was not admissible, unless proved by evidence aliunde to be accurate; for as he was not a competent witness for himself, so what he wrote could not be evidence for him. (o) And here it is of the utmost importance to remember that there are no degrees of secondary evidence. (p)<sup>3</sup> A party entitled to resort to this mode of

(n) *Reeve v. Long*, Holt, 286; *Anon.*, Skinn. 174; *Liebman v. Pooley*, 1 Stark. 167; *Everingham v. Rounding*, 2 Moo. & R. 138; *Gilb. Ev.* 9, 4th Ed.

(o) *Fisher v. Samuda*, 1 Camp. 192-3. (p) *Doe d. Gilbert v. Ross*, 7 M. & W. 102; *Hall v. Ball*, 3 Scott, N. R. 577; *Brown v. Woodman*, 6 Car. & P. 206.

*Johns.* 293; *Edwards v. Bonneau*, 1 Sandf. (N. Y.) 610; *Forward v. Harris*, 30 Barb. 338; *Pickering v. Myers*, 2 Bailey (S. C.) 113; *Hamilton v. Rice*, 15 Tex. 382; nor in an action to recover the amount of a forged bank note (*Luckett v. Clark*, Litt. (Ky.) Select Cases, 178); nor if the document is hopelessly lost, or out of the possession of parties or the jurisdiction of the court (*McCreery v. Hood*, 5 Blackf. 116; *McCaulay v. Earnhart*, 1 Jones (N. C.) L. 502; and see *Bowman v. Weltling*, 39 Ill. 416; *Mitchell v. Jacobs*, 17 Id. 236; *Shepherd v. Giddings*, 22 Conn. 282.

<sup>1</sup> The rule of law, that the best evidence which the nature of the case admits must be produced, applies as well to secondary as to primary evidence. *Coman v. State*, 4 Blackf. (Ind.) 241.

<sup>2</sup> So a copy of a copy of a muster roll is not competent evidence to show that a man enrolled therein is a United States soldier. *Orman v. Riley*, 15 Cal. 48.

<sup>3</sup> *Carpenter v. Dame*, 10 Ind. 125. But whenever this rule

proof may use any form of it; his not adducing, or even willfully withholding some other, likely to be more satisfactory, is only matter of observation for the jury. Thus the evidence of a witness who has read a destroyed or lost document is perfectly receivable, although a copy or abstract of it is in existence, and perhaps even in court. This rule, so elementary in its nature, was not established until the case of *Doe d. Gilbert v. Ross* (9) in 1840; previous to which, however, various dicta were to be found on the subject, and the prevailing opinion was rather the other way. (r) But that decision is in perfect accordance with the general principles of evidence, and a contrary doctrine would open the widest door to fraud and chicane. At the trial of the case on the circuit, in order to prove, by secondary evidence, the contents of a marriage settlement,—a copy which was tendered having been rejected for want of a stamp,—a short-hand writer's notes of a former trial, at which the settlement was proved, were offered and received by the judge. The jury having found for the plaintiff, it was objected before the court in banc that this evidence ought not to have been received, especially as it appeared that a copy of the settlement was in existence; and several of the previous dicta were cited. The court, however,

(9) 7 M. &amp; W. 102.

author in the *Monthly Law Mag.*, vol.

(r) The cases were collected by the 4, p. 265.

is invoked against a party, he is permitted to show that what appears to be, is not in fact, a higher degree of secondary evidence. *Harvey v. Thorpe*, 28 Ala. 250. Where a way bill is a copy of a copy, oral evidence of the weight of the goods described in such bill is admissible. *Young v. Mertens*, 27 Md. 114. A plat of survey purporting to be an extract from an approved map of a particular township, certified by the register of the land office, is inadmissible as evidence, it being only the copy of a copy. *Lawrence v. Grout*, 12 La. Ann. 835.

refused. even a rule to show cause on this point; Parke, B., in the course of the argument, observing to the counsel: (s) "You must contend, then, that there is to be primary, secondary, and tertiary evidence. If an attested copy is to be one degree of secondary evidence, the next will be a copy not attested; and then an abstract: then would come an inquiry, whether one man has a better memory than another, and we should never know where to stop." And in delivering judgment the same judge expressed himself thus: "As soon as you have accounted for the original document, you may then give secondary evidence of its contents. When parol evidence is then tendered, it does not appear from the nature of such evidence, that there is any attested copy, or better species of secondary evidence behind. We know of nothing but of the deed which is accounted for, and therefore the parol evidence is in itself unobjectionable. Does it then become inadmissible, if it be shown from other sources, that a more satisfactory species of secondary evidence exists? I think it does not; and I have always understood the rule to be, that when a party is entitled to give secondary evidence at all, he may give any species of secondary evidence within his power." And Alderson, B., said, "I agree with my brother Parke, that the objection must arise from the nature of the evidence itself. If you produce a copy which shows that there was an original, or if you give parol evidence of the contents of a deed, the evidence itself discloses the existence of the deed. But reverse the case,—the existence of an original does not show the existence of any copy; nor does parol evidence of the contents of a deed show the existence of anything except the deed itself. If one species of secondary



evidence is to exclude another, a party tendering parol evidence of a deed, must account for all the secondary evidence that has existed. He may know of nothing but the original, and the other side, at the trial, may defeat him by showing a copy, the existence of which he had no means of ascertaining. Fifty copies may be in existence unknown to him, and he would be bound to account for them all." (t)

484. There are several exceptions to the rule which requires primary evidence to be given. The following are the principal: First, where the production of it is physically impossible, as where characters are traced on a rock; or, secondly, where it would be highly inconvenient on physical grounds, as where they are engraven on a tombstone, (u) or chalked on

(t) In some parts of America they take a sort of middle course about this, which is thus described in 1 Greenl. Ev. § 81, note (2), 7th Ed.: "The American doctrine, as deduced from various authorities, seems to be this: that if, from the nature of the case itself, it is manifest that a more satisfactory kind of secondary evidence exists, the party will be required to produce it; but that where the nature of the case does not of itself disclose the existence of such better evidence, the objector must not only prove its existence, but also must prove, that it was known to the other party in season to have been produced at the trial. Thus, where the record of a conviction was destroyed, oral proof of its existence was rejected, because the law required a transcript to be sent to the Court of Exchequer, which was better evidence. A grant of letters of administration was presumed after proof from the records of various courts, of the administrator's recognition there, and his

acts in that capacity; and where the record books were burnt and mutilated, or lost, the clerk's docket and the journals of the judges have been deemed the next best evidence of the contents of the record. In all these, and the like cases, the nature of the fact to be proved, plainly discloses the existence of some evidence in writing, of an official character, more satisfactory than mere oral proof; and therefore the production of such evidence is demanded. But where there is no ground for legal presumption that better secondary evidence exists, any proof is received, which is not inadmissible by other rules of law; unless the objecting party can show that better evidence was previously known to the other, and might have been produced, thus subjecting him, by positive proof, to the same imputation of fraud, which the law itself presumes when primary evidence is withheld."

(u) Tracy Peerage case, 10 Cl. & F 154.

a wall or building, (*v*) or contained in a paper permanently fixed to it, (*x*) &c.

485. 3. The most important and conspicuous exception, however, is with respect to the proof of records, (*y*) and other public documents of general concernment, (*z*) the objection to producing which rests on the ground of moral, not physical inconvenience. They are, comparatively speaking, little liable to corruption, alteration, or misrepresentation, the whole community being interested in their preservation, and, in most instances, entitled to inspect them; while private writings, on the contrary, are the objects of interest but to few whose property they are, and the inspection of them can only be obtained, if at all, by application to a court of justice. The number of persons interested in public documents, also renders them much more frequently required for evidentiary purposes; and if the production of the originals were insisted on, not only would great inconvenience result from the same documents being wanted in different places at the same time, but the continual change of place would expose them to be lost, and the handling from frequent use would soon ensure their destruction. For these and other reasons, (*a*) the law deems it bet-

(*v*) *Mortimer v. M'Callan*, 6 M. & W. 58, 63 and 68; *Sayer v. Glossop*, 2 Exch. 411, per Rolfe, B.; *Bruce v. Nicolopulo*, 11 Exch. 129.

(*x*) *R. v. Fursey*, 6 C. & P. 84; *Jones v. Tarleton*, 9 M. & W. 675.

(*y*) *Dr. Leyfield's case*, 10 Co. 92 b; *Doct. Placit.* 201, 206; *Leighton v. Leighton*, 1 Str. 210.

(*z*) *Mortimer v. M'Callan*, 6 M. & W. 58; *Lynch v. Clarke*, Holt, 293; 3 Salk. 154. See *infra*.

(*a*) It is said in some books that the reason why records may be proved by a copy is, that no erasure or interlinea-

tions shall be intended in them. *Dr. Leyfield's case*, 10 Co. 92 b; B. N. P. 227. But though this may be one reason, it is neither the only nor the principal one. The actual record must be produced on an issue of noli tuel record in the same court; and although it is a *præsumptio juris et de jure*, that officers of courts of justice make up their records accurately, and keep them from being tampered with, so strong a presumption could hardly be made in favor of public books and documents not of a judicial character.

ter to allow their contents to be proved by derivative evidence, and to run the chance, whatever that may be, of errors arising from inaccurate transcription, either intentional or casual. But, true to its great principle of exacting the best evidence that the nature of the matter affords, the law requires this derivative evidence to be of a very trustworthy kind, and has defined with much precision the forms of it which may be resorted to in proof of the different sorts of public writings. (*b*) Thus it must, at least in general, be in a written form, *i. e.*, in the shape of a copy, and, as already mentioned, (*c*) must not be a copy of a copy. In very few, if in any instances, is oral evidence receivable to prove the contents of a record or public book which is in existence.<sup>1</sup>

(*b*) At first sight this may appear at variance with the maxim that there are no degrees in secondary evidence; but it does not fall within its principle. *E.g.*, a party wants to prove the contents of a *private* document in the possession of his adversary, who refuses to produce it; and for this purpose calls a witness, who offers to state its contents from memory. How unjust would it be if the opposite party could

exclude this evidence, by showing that a copy of the document was in existence, which perhaps was even made the day before the trial, with the view of enabling him to raise the objection. See *supra*, § 483. But this reasoning can not apply in the case of a *public* document, which is kept in a known place, where every one may inspect and obtain a copy of it.

(*c*) *Supra*, § 483.

<sup>1</sup> This rule applies to all orders, judgments, and decrees of a court of record. *Ludlow v. Johnston*, 3 Ohio, 553; *Brown v. Wright*, 4 Yerg. 57. An order of court nunc pro tunc, can not be established upon mere parol of what was ordered to be done at a previous term. The minutes of record of the court must be produced, or proved to be lost or destroyed. *Ludlow v. Johnson*, 3 Ohio, 553. To prove what the verdict in a previous suit was, and that there was no new trial in such suit. *Abrams v. Smith*, 8 Blackf. (Ind.) 95. To show what the parties agreed to refer. *Grimes v. Grimes*, 1 Dana (Ky.) 234. The sale of land under an order of a court of chancery. *Phillips v. Costley*, 40 Ala. 486. That an officer was requested to serve a writ. *Williams v. Cheeseborough*, 4 Conn. 356.

The proceedings of the court of admiralty, before whom

486. The principal sorts of copies used for the proof of documents are : 1. Exemplifications under the great seal. 2. Exemplifications under the seal of

was tried the question of prize or no prize, is the best evidence in an action on a policy of insurance. *Massonier v. Union Ins. Co.*, 1 Nott. & M. (S. C.) 155. To show what were the pleadings in the court below on error to a superior court. *Beach v. Baldwin*, 9 Conn. 476. To show when a suit was instituted, declaration filed, or judgment rendered. *Sherman v. Smith*, 20 Ill. 350. Where it is sought to connect a suit before a justice, dismissed by reason of a plea of title, with a suit subsequently prosecuted for the same cause in the common pleas, the written proceedings before the justice must be produced; the facts can not be established by parol. *Webb v. Alexander*, 7 Wend. (N. Y.) 281.

The discontinuance of an action entered in court must be proved by the record, or an authenticated transcript. *Shields v. Frink*, 12 Pick. (Mass.) 568. The agreement of counsel at an argument upon a writ of habeas corpus that the superior court at the trial of the prisoner refused to allow exceptions, is not competent evidence that the superior court made such a ruling, but such decision must appear by the records of that court. *Fleming v. Clark*, 12 Allen (Mass.) 191. In a suit for the possession of a chattel, the defendant can not show by parol that it was taken from the plaintiff and placed in his possession by legal process, but must produce a copy of the process. *Wynne v. Aubuchon*, 23 Mo. 30. The record, or a copy of it, is the best evidence of the fact that a person has been bound over for his appearance at court, to answer to charges of perjury. *Smith v. Smith*, 43 N. H. 536. The only legal evidence of the terms of an order of court is the record, or a duly certified copy thereof. *Michener v. Lloyd*, 16 N. J. Eq. 38.

A witness can not testify to the foreclosure and sale of mortgaged premises : the record of the suit is the proper evidence. *Kennedy v. Reynolds*, 27 Ala. 364. The original papers in a cause are admissible in evidence where there is nothing to show that any final record has been made. *Bufington v. Cook*, 39 Ala. 64. On a plea of a former suit in the same court, and nul tiel record replied, parol evidence is not admissible to prove such former suit. *Alexander v. Foreman*, 7 Ark. 252. In a suit against a justice of the peace for not filing the papers in an appeal in time, the best evidence of the

the court where the record is. 3. Office copies, *i. e.*, copies made by an officer appointed by law for the purpose. 4. Examined copies. An examined copy is a copy sworn to be a true copy, by a witness who has compared it line for line with the original, or who has examined the copy while another person read the original. The document must be in a character and language that the witness understands, (*d*) and he must also have read the whole of it. (*e*) According to most authorities, when the latter of the above modes of examination is resorted to, it is unnecessary to call both the persons engaged in it, or that they should have alternately read and inspected the original and copy, for that it ought not to be presumed that any person would willfully misread a record. (*f*) But in a modern case, before a committee of privileges of the House of Lords, where, in order to prove a memorandum roll in the Court of Exchequer in Dublin, a witness produced a copy of the roll, which he said he had compared with the original, according to the usual custom of the office—the clerk in the

(*d*) Crawford Peerage case, 2 Ho. pl. 259.

Lo. Cas. 544-5.

(*f*) Rolfe v. Dart, 2 Taunt. 52 ;

(*e*) Nelthrop v. Johnson, Clayt. 142, Giles v. Hill, 1 Campb. 471, note.

justice's judgment to the record or copy certified by him. Mills v. Barnes, 4 Blackf. (Ind.) 438; Wabash, &c. Canal v. Reinhart, 22 Ind. 463. The testimony of a juror as to the issues joined in a suit is not admissible, but the record of the pleadings filed in the suit, must be produced. State v. Thompson, 19 Iowa, 299; Stromburg v. Earick, 6 B. Monr. (Ky.) 578.

The record of the notice of a foreclosure of a mortgage is the only proper evidence of the time of the foreclosure of the right of redemption. Chase v. Savage, 55 Me. 543. A party can not introduce the testimony of a solicitor in chancery, that he had used due diligence in certain chancery proceedings, but the record should be produced. Duvall v. Peach, 1 Gill (Md.) 172.

office holding the original, and reading it, while the witness held the copy, without changing hands—and what he heard the clerk read, corresponded with what the witness saw in the copy—the committee held that this practice was incorrect ; that the witness could not swear that the document produced was a close copy, and therefore it could not be received ; that it was important it should be known that copies must be compared in a different manner, viz., by changing hands. The same witness having said, on producing a copy of a statute roll, that, besides comparing it in the usual way, in the office, he read it with the original himself, the document was received as evidence. (*g*) The rule laid down in that case is not, however, always followed in practice. 5. Copies signed and certified as true by the officer to whose custody the original is entrusted. 6. Photograph copies : of all others, the best for showing any peculiarities that exist in the original document, and consequently invaluable in cases turning on those peculiarities, as, for instance, when the original is suspected of having been tampered with after the copy has been taken, &c. An examination of the cases in which these various species of copies may be used as proof of public or other documents, would be altogether foreign to a work like the present ; suffice it to say that there are a few instances where none of them is receivable, and the original must be produced. Of these the principal is, where the gist of a party's action or defense lies in a record of the court where the cause is, and issue is joined on a plea of nul tiel record. Here it is obvious that the reasons which plead so strongly for allowing inferior

(*g*) Slane Peerage case, 5 Cl. & F. 42.

evidence to prove records, &c., (*h*) do not apply :  
 "Cessante ratione legis, cessat ipsa lex." (*i*)<sup>1</sup>

487. Public documents, though not of a judicial nature, such as registers of births, marriages, and deaths, (*k*) the books of the Bank of England, (*l*) or of the East India Company, (*m*) bank bills on the file at the Bank, (*n*) &c., are, in general, provable by examined copies. And by 14 & 15 Vict. c. 99, s. 14, it is enacted that, "whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof, or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract, by the officer to whose custody the original is intrusted."

488. By several modern acts of parliament, special modes of proof are provided for many kinds of records and public documents. By "The Documentary Evidence Act, 1868," (*o*) sect. 2, it is enacted as follows :

(*h*) *Supra*, § 485.

(*i*) Co. Litt. 70b.

(*k*) *Lynch v. Clarke*, Holt. 293 ; 3 Salk. 154 ; *Sayer v. Glossop*, 2 Exch. 409. These documents are within the 14 & 15 Vict. c. 99, s. 14, cited *infra*. See *R. v. Weaver*, L. Rep. 2 C. C. 85.

(*l*) *Mortimer v. M'Clellan*, 6 M. & W. 58.

(*m*) *Shelling v. Farmer*, 1 Str. 646; note to the case of *R. v. Lord Geo. Gordon*, 2 Dougl. 593.

(*n*) *Man v. Cary*, 3 Salk. 155.

(*o*) 31 & 32 Vict. c. 37. Subject to any law that may from time be made by the legislature of any British colony or possession, this act is to be in every such colony and possession ; sect. 3.

<sup>1</sup> When the reason for a law ceases, the law itself ceases to be binding.

"Prima facie evidence of any proclamation, order, or regulation issued before or after the passing of this act by her majesty or by the privy counsel, also of any proclamation, order, or regulation, issued before or after the passing of this act, by or under the authority of any such department of the government, or officer as is mentioned in the first column of the schedule hereto, (*p*) may be given in all courts of justice, and in all legal proceedings whatever, in all or any of the modes hereinafter mentioned, that is to say :

"1. By the production of a copy of the 'Gazette,' purporting to contain such proclamation, order, or regulation.

"2. By the production of a copy of such proclamation, order, or regulation, purporting to be printed by the government printer, or, where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession.

"3. By the production, in the case of any proclamation, order, or regulation issued by her majesty or by the privy counsel, of a copy or extract purporting to be certified to be true by the clerk of the privy council, or by any one of the lords or others of the privy council, and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true, by the person or persons specified in the second column

|                                     |                                |
|-------------------------------------|--------------------------------|
| ( <i>p</i> ) <i>I. e.</i> :         | Secretaries of State ;         |
| The Commissioners of the Treasury ; | Committee of Privy Council for |
| The Commissioners for executing the | Trade ;                        |
| Office of Lord High Admiral ;       | The Poor Law Board.            |



of the said Schedule in connection with such department or officer. (*g*)

“Any copy or extract made in pursuance of this act may be in print or in writing, or partly in print and partly in writing.

“No proof shall be required of the hand-writing or official position of any person certifying, in pursuance of this act, to the truth of any copy of or extract from any proclamation, order, or regulation.”

By the 7th section of the statute 14 & 15 Vict. c. 99, it is enacted, that “All proclamations, treaties, and other acts of state, of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or

|   |   |
|---|---|
| ( <i>g</i> ) <i>I. e.</i> :   | State ;   |
| Any Commissioner, Secretary, or Assistant Secretary of the Treasury.  | Any Member of the Committee of Privy Council for Trade, or any Secretary or Assistant Secretary of the said Committee ; |
| Any of the Commissioners for executing the Office of Lord High Admiral or either of the Secretaries to the said Commissioners ; | Any Commissioner of the Poor Law Board, or any Secretary or Assistant Secretary of the said Board.                      |
| Any Secretary or Under Secretary of   |   |

other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement." The 12th section relates to proof of the register of British vessels. And by sect. 13, "Whenever in any proceeding whatever, (r) it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offense, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified or purport to be certified under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof."

(r) That is, either civil or criminal. *Richardson v. Willis*, L. Rep., 8 Ex. 69

The 8 & 9 Vict. c. 113, s. 3, enacts, "All copies of private and local and personal acts of parliament not public acts, if purporting to be printed by the queen's printers, and all copies of the journals of either house of parliament, and of royal proclamations, purporting to be printed by the printers to the crown or by the printers to either house of parliament, or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed."

Of these and similar enactments, of which a large number are to be found in the recent statute books, (s) it is to be observed that in general they are cumulative, not substitutionary; *i. e.*, they do not abolish the common-law mode of proof, and only provide a more easy or summary one, of which parties may, if they please, avail themselves. (t)

489. 4. Another exception is in the case of public officers. It is a general principle that a person's acting in a public capacity, is *prima facie* evidence of his having been duly authorized so to do; and even though the office be one the appointment to which must be in writing, it is not, at least, in the first instance, necessary to produce the document, or account for its non-production. The grounds of this have been examined in another place. (u)

490. 5. Where a witness is being interrogated on the *voir dire*, with the view of ascertaining his competency, if that competency depends on written instruments, he may state their nature and contents. (v)

491. The principle of the rule in question being

(s) See one of the latest, the "Municipal Corporations' Evidence Act, 1873," 36 & 37 Vict. c. 33.

(t) See 31 & 32 Vict. c. 37, s. 6.

(u) *Supra*, ch. 2, sect. 2, sub-sect. 4, § 356.

(v) *Tayl. Evid.* §§ 433 & 1242, 4th Ed. See also per Maule, J., in *Macdonnell v. Evans*, 11 C. B. 930.

that the secondary evidence borrows its force from the primary, of which, owing to the general infirmity of all derivative proof, it may not be a perfect representation, it follows that circumstantial evidence, when original and proximate in its nature, is not affected by the rule. (x) It is evidence in the direct, not in the collateral line, which falls within the exclusion. For the same reason it seems—although much has been said and written on both sides of the question—that self-dis-serving statements by a party against his own interest, are receivable as primary proof of documents. But this will be considered under the head of self-regarding evidence. (y)

(x) Bk. I, pt. I, s. 38 *et seq.*, and (y) *Infra*, ch. 7.  
*supra*, ch. I, § 295.

## CHAPTER IV.

## DERIVATIVE EVIDENCE IN GENERAL.

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492. The infirmity of derivative or second-hand evidence, as compared with its original source, has been shown in the Introduction to this work ; (*a*) and the danger of this kind of proof increases according to its distance from that source, and the number of media or instruments through which it comes to the

(*a*) Introd. pt. 1, §§ 29, 30 ; pt. 2, § 51.

cognizance of the tribunal. (*b*) The five following forms of it were there enumerated: 1. Supposed oral evidence, delivered through oral. 2. Supposed written evidence, delivered through written. 3. Supposed oral evidence, delivered through written. 4. Supposed written evidence, delivered through oral. 5. Reported real evidence. The last of these, (*c*) and the secondary evidence of documents which would be evidence if produced, (*d*) have been already considered; and the present chapter will be devoted to the admissibility of derivative evidence in general.

493. The general rule is, that derivative or second-hand proofs are not receivable as evidence in causa—a rule which forms one of the distinguishing features of our law of evidence, (*e*) and the gradual establishment of which has been already traced. (*f*)<sup>1</sup> The reasons

(*b*) Introd. pt. 1, §§ 29 and 30.

(*e*) Introd. pt. 1, § 29, and bk. 1, pt.

(*c*) See bk. 2, pt. 2, § 198.

1, § 89.

(*d*) See the preceding chapter.

(*f*) Bk. 1, pt. 2.

<sup>1</sup> The difference between primary and secondary evidence is more or less recognized by the laws of every country. In "A code of Centoo Laws, or ordination of the Pundits, from a Persian translation made from the original, written in the Sanscrit Language" (London, 1777), we find (chap. 2, sect. 6, p. 109), the rules laid down: "Whosoever has seen a transaction with his own eyes, or has heard it with his own ears, such a person is a witness. When a plaintiff or defendant have not applied to a witness, who is conscious of any transaction, desiring him to appear as a witness in their case; if the magistrate or arbitrator summon such a witness, and question him as to the circumstances of the transaction, such part of the evidence as relates to what he has seen with his own eyes, or heard with his own ears, is approved. When a person, being witness to any transaction, hath explained the circumstances of that transaction to another person, the plaintiff or defendant may constitute such person as a witness, or testify whatever was explained to him by the other; and the evidence delivered by such secondary witness is approved." This latter, which appears to be admissible by the rule, appears to be exactly what we

commonly assigned for it are : 1. That the party against whom the proof is offered, has no opportunity of cross-examining the original source whence it is derived ;—but this will not explain the rejection of second-hand evidence when it comes in a written form. 2. That assuming the original evidence truly reported, it was not itself delivered under the sanction of an oath. To this the same objection may be made : besides, the derivative evidence would not be the more receivable, if the original evidence were delivered under that sanction ; for the statement of a third party made on oath, even in *judicio*, is not evidence against a person who was no party to the judicial proceeding.

494. The foundations of the rule lie much deeper than this. Instead of stating as a maxim that the law requires all evidence to be given on oath, we should say that the law requires all evidence to be given under personal responsibility, *i. e.*, every witness must give his testimony under such circumstances as expose him to all the penalties of falsehood, which may be inflicted

now call “hearsay evidence.” Among other novel rules of evidence in the “Pootee ; or, Compilation of the Ordinances of the Pundits,” are the following : “In a suit concerning limits and boundaries, whoever is acquainted with the true state of those limits and boundaries, without being appointed witness in the case, may deliver his evidence. If a plaintiff or a defendant secretly hides a person where he may overhear a discourse, and then asks a witness the true circumstances of the case, and that person with his own ears hears the relation of the witness, such person is called a hidden witness, and the testimony of a hidden witness is true. He who is a witness shall keep by him a written statement of every transaction in which he is a witness, that, even after a considerable space of time, he may be enabled to recollect it. A witness, a borrower or principal in any other affair, shall write with his own hand an account of every affair so concerning him ; if he does not know how to write himself, he shall cause it to be written by another,” &c., &c.

by any of the sanctions of truth. (*g*) Now oaths, so far from being the sole sanction of truth, are only a particular, although doubtless very effective application of one, namely, the religious sanction; (*h*) and if they were abolished, the rule rejecting second-hand evidence ought to remain exactly as it is. Indeed, several classes of persons are excused by statute from taking oaths, (*i*) and their evidence, given on solemn affirmation, stands on the same footing with relation to admissibility as if they had been sworn. The true principle, therefore, appears to be this—that all second-hand evidence, whether of the contents of a document or of the language of a third person, which is not connected by responsible testimony with the party against whom it is offered, is to be rejected.<sup>1</sup> And this will explain a matter which at first view seems anomalous; namely, that the principle governing secondary, does not extend to second-hand evidence; for in the latter case, no matter how unanswerably the absence of the original source is accounted for, the inferior evidence will not be received. Thus what A (a witness) has heard B (a stranger) say, is not only not admissible

(*g*) *Intro. pt. 1, §§ 16 et seq.*

(*i*) See bk. 2, pt. 1, chap. , § 166.

(*h*) *Intro. pt. 2, §§ 56 et seq.*

<sup>1</sup> Hearsay and reputation are not competent to prove any fact, except in questions relating to public rights. *Winter v. United States*, 1 Hempst. 344; *Sherwood v. Houston*, 41 Miss. 59; *Page v. Parker*, 40 N. H. 47; *Memoney v. Walker*, 1 N. J. L. (Coxe) 33; *Claiborne v. Parish*, 2 Wash. 146; *Mima Queen v. Hepburn*, 7 Cranch, 290; *Scales v. Desha*, 16 Ala. 308; *Parker v. State*, 8 Blackf. (Ind.) 292; *Chapin v. Taft*, 18 Pick. (Mass.) 379; *Wells v. Shipp*, 1 Miss. (Walk.) 353. Though if no better evidence anywhere exist, hearsay evidence is admissible. *Gould v. Smith*, 35 Me. 513. And evidence as to the loss of a paper, being directed to the court and not to the jury, may be received, even if hearsay. *Bridges v. Hyatt*. 2 Abb. Pr. (N. Y.) 449.



in the first instance, but the clearest proof of the death, or of the complete and incurable lunacy of B, would not render it admissible. The reason is that, in the one case, the primary source being perfect in itself, and receivable in evidence if produced, so soon as that source is exhausted, the evidence offered is simply derivative of it, and excludes all possible chances of error except those which may be found in the medium of evidence used. But when the document is one which would not be evidence if produced, as not being traced to the party against whom it is offered; or where the proof tendered consists of the statement of a person who can not be subjected to cross-examination, the primary source is not exhausted, and derivative proof is rightly rejected.

495. The rule in question is commonly enunciated, both in the books and in practice, by the maxim "Hearsay is not evidence,"—an expression inaccurate in every way, and which has caused the true nature of the rule to be very generally misunderstood. The language of this formula conveys two erroneous notions to the mind; first, directly, that what a person has been heard to say is not receivable in evidence; and, secondly, by implication, that whatever has been committed to writing, or rendered permanent by other means, is receivable—positions neither of which is even generally true. On the one hand, what a man has been heard to say against his own interest is not only receivable, but is the very best evidence against him; (*j*) and on the other, as already stated, (*k*) written documents with which a party is not identified are frequently rejected. Hence it is that hearsay evidence is so often confounded with *res gestæ*, *i. e.* the original proof of what has taken place, and which<sup>1</sup>

(*j*) See *infra*, ch. 7.

(*k*) *Supra*, § 494.

the least reflection will show may consist of words as well as of acts. Thus, on an indictment for treason in leading on a riotous mob, evidence of the cry of the mob is not hearsay, and is as original as any evidence can be; (*l*) and so are the cries of a woman who is being ravished. (*m*) So, where an action on a policy of insurance, effected by a deceased person on his own life, was defended on the ground that he had no interest in the policy; evidence that, previous to effecting the insurance, the deceased had consulted another person on the subject of insuring his own life, was held to be admissible as part of the *res gestæ*. (*n*) So, although the relation of what a stranger has been heard to say will be rejected, if offered as evidence of the truth of his words, seeing that it comes *obstetricante manu*; yet, whether certain words were spoken is a fact, and may be proved as such, is relevant to the issue raised. Thus, although common rumor can not be received as proof of a fact,—being hearsay in one of its worst forms,—yet when the conduct of a person is in question, evidence as to whether a certain rumor had reached his ears at a particular time, may be perfectly receivable. (*o*)<sup>1</sup> We are not to consider

(*l*) Case of *Damaree and Purchase*, 4 Jurist, N. S. 244, per Erle, Fost. Cr. Law, 213; 15 Ho. St. Tr. J. And see *Milne v. Leisler*, 7 H. & 522; *R. v. Lord George Gordon*, 21 N. 786.  
Ho. St. Tr. 514, 529.

(*m*) See *Mascard. de Prob. Concl.* 23, n. 1. (*o*) 2 Inst. 52; T. 1 Edw. II. 12, tit. Imprisonment; *Jones v. Perry*, 2 Esp. 482; *Thomas v. Russell*, 9 Exch. 764.

(*n*) *Shilling v. The Accidental Death* See *Goodeve, Evidence*, 423.

<sup>1</sup> Evidence of rumor or of common report of a fact is not admissible if there be a presumption that better evidence may be obtained; *Glover v. Millings*, 2 Stew. & P. 28; but notoriety of a fact may be proved to found an inference of knowledge of that fact in a party. *Ward v. Herndon*, 5 Port. (Ala.) 328. So in a suit for injury by representations as to a person's sol-

whether evidence comes by word of mouth or by writing, but whether it is original in its nature, or indicates any better source from which it derives its weight.

vency, hearsay was admitted to prove the notoriety of the insolvency in the neighborhood, and establish a presumption that defendants knew it when they represented him otherwise. *Id.* And see *Bennoist v. Darby*, 12 Mo. 196; *Haws v. Marshall*, 2 A. K. Marsh. Ky.) 413; *Banta v. Clay*, *Id.* 409; *Wooley v. Bruce*, 2 Bibb. (Ky.) 105. A statement merely, that the witness was told a fact existed, is too general to prove it, even if common rumor were sufficient. *McNeill v. Arnold*, 22 Ark. 477. In an action against a railroad to recover damages sustained by means of a collision between a locomotive engine of the defendants and a horse and carriage on a highway, the carelessness of the driver of the carriage can not be proved by common reputation. *Baldwin v. Western Railroad*, 4 Gray (Mass.) 333. A witness who has known a town for a great number of years may give evidence of a general and uniform reputation and understanding, to show that what was once called the town of A is now called the town of B; but not to show that the town was covered by a particular grant. *Toole v. Peterson*, 9 Ired. (N. C.) L. 180. Reputation, in connection with proof of acts of ownership, is admissible to establish a private right, in derogation of a public right. *Russell v. Stocking*, 8 Conn. 236. Circumstantial evidence of notoriety is sufficient. *Crow v. Harrod*, Hard. (Ky.) 435; *Ogden v. Stublefield*, 4 Ala. 40. Common report of a party's intention in purchasing goods is not competent to charge the vendor with knowledge of such intention. *Hedges v. Wallace*, 2 Bush. (Ky.) 442. A reason for doing an act, when the reason is founded on a rumor, is not admissible in evidence. *The Governor v. Campbell*, 17 Ala. 566. General reputation is not competent evidence to prove a partnership; but the transactions of parties bearing on the point may be received, if not objectionable on general principles. *Hersom v. Henderson*, 23 N. H. (3 Fost.) 498. The qualities or value of a horse can not be proved by reputation. *Heath v. West*, 26 N. H. (6 Fost.) 191. Proof of a rumor of an adverse claim to property sold is not admissible to affect the question of value. *Prescott v. Hayes*, 43 N. H. 593. And so reputation or rumor has been

496. There are several exceptions to the rule excluding second-hand evidence; and it will be found, on examination, that in most, if not in all the cases where the rule has been relaxed, the derivative evidence received, is guarded by some security which

held inadmissible to prove that a defendant was at a certain time without money or credit; *Trowbridge v. Wheeler*, 1 Allen (Mass.) 162; or to prove insanity; *Foster v. Brooke*, 6 Ga. 287; or to prove agency; *Blevins v. Pope*, 7 Ala. 371; *Perkins v. Stebbins*, 29 Barb. (N. Y.) 523; or to show a dangerous illness, or that a person is at the point of death; *Mosser v. Mosser*, 32 Ala. 551; or to show that a party who has been in possession of land, occupied it as tenant, and had no title thereto; *Moore v. Jones*, 13 Ala. 296. General reputation in the neighborhood is evidence on a question of legitimacy, though its weight will depend on the circumstances of each case. *Stegall v. Stegall*, 2 Brock. 256.

Common reputation in a family is evidence of a marriage therein; and it seems declarations of one of the family are admissible evidence of such reputation, made before the fact of marriage was in controversy. *Morgan v. Purnell*, 4 Hawks (N. C.) 95. Evidence of general reputation and belief in the neighborhood is not admissible for the purpose of disproving the existence of a marriage. *Henderson v. Cargill*, 31 Miss. 367.

That two lived together in a state of concubinage, can never be proved by general reputation. *Carrie v. Cumming*, 26 Ga. 690. Evidence of general reputation is not admissible to prove the relation of husband and wife, in an action brought under the statute, for the use of a wife, to recover money lost by her husband on a wager upon a horse-race. *Davis v. Orme*, 36 Ala. 540. Hearsay is not evidence, except in relation to pedigree, custom, or prescription; or where the exceptions to the rule are as ancient as the rule itself. *Everingham v. Mesroon*, 2 Brev. (S. C.) 461. That one is reported to be an Irishman, and has the brogue of an Irishman, is *prima facie* evidence that he is an Irishman. *Jackson v. Ely*, 5 Cowan, 314. But the declaration of a grandmother of one who is charged with being of colored birth, that his mother was the offspring of a white person and herself, are not admissible evidence upon the question. *State v. Waters*, 3 Ired. (N. C.) L. 455. But hearsay evidence,

renders it more trustworthy than derivative evidence in general. First, then, on a second trial of a cause between the same parties, the evidence of a witness examined at the former trial, and since deceased, is receivable; and may be proved by the testimony of a person who heard it, or by notes made at the time. (*p*) Here the evidence was originally delivered under responsibility, and the party against whom it is offered had on a former occasion the opportunity for cross-examination: still the benefit of the demeanor of the witness in giving it is lost. So by the 11 & 12 Vict. c. 42, s. 17, where a witness who has been examined before a justice of the peace, against a person charged with an offense, dies before the trial of the accused, or is so ill as to be unable to travel, his deposition, reduced to writing and signed by the justice, may be received in evidence. (*q*)

497. 2. The next exception is in the proof of matters of public and general interest; such as the boundaries of counties or parishes, rights of common claims of highway, &c. (*r*)<sup>1</sup> We have seen that in

(*p*) 1 Phill. Ev. 306, 10th Ed.

(*q*) Bk. 1, pt. 1, § 105.

(*r*) See as to this, very fully, *R. v. Inhabitants of Bedfordshire*, 4 E. & B. 535, 542. See also, 1 Phill. Ev. ch. 8, sect. 3, 10th Ed.; *Tayl. Ev. Part 2*, ch.

8, 4th Ed. See *Mascard. de Prob. Concl.* 287, 395-403. As to what are public rights, within the rule in question, see *Lord Dunraven v. Llewellyn*, 15 Q. B. 791.

though admissible to prove birth and pedigree, is incompetent to create or destroy a title to property. *Carter v. Buchanan*, 9 Ga. 539.

<sup>1</sup> When the question is upon a disputed boundary line, the court will not permit hearsay evidence to be given, that a particular object (such as a spring) was on the land of one of the parties. *Frazer v. Hunter*, 5 Cranch C. Ct. 470.

In Massachusetts, the incorporation of a town, parish, &c., may be proved by reputation, if it appear that no incorporating act can be found; for by fires in Boston, in 1711 and

proof of historical facts,—of what has taken place in by-gone ages,—derivative evidence must not only from necessity be resorted to, but that it is disarmed of much of its danger, from the permanent effects which are visible to confirm or contradict it, the number of sources whence it may spring, the number of persons interested in preserving the recollection of the matters in question; and the consequent facilities for detecting false testimony. (s) Now it is obvious, that rights of public or general interest which are supposed to have been exercised in times past, partake in some degree of the nature of historical facts, and especially in this, that it is rarely possible to obtain original proof of them. The law accordingly allows them to be proved by general reputation:—*E. g.*, by the declarations of deceased persons who may be presumed to have had competent knowledge on the subject; (t) by old documents

(s) Introd. pt. 2, §§ 50 *et seq.*(t) See *Crease v. Barrett*, 1 C., M. & R. 919.

1760, many of the public records of the province were destroyed. *Dillingham v. Snow*, 5 Mass. 552.

An ancient boundary can not generally be proved otherwise than by reputation; and evidence going to show that certain lines were generally reputed to be the lines of a particular ancient survey, is admissible. *Smith v. Nowells*, 2 Litt. (Ky.) 150. But evidence that the line so established was not the true one, is not admissible in certain cases. *Tyler v. Dyer*, 2 Me. 41. And see *Lone Star Co. v. West Point Co.*, 5 Cal. 447; *Sullivan v. Lowder*, 11 Me. (2 Fairf.) 426; *Howell v. Tilden*, 1 Har. & M. (Md.) 84; *Long v. Pellett*, Id. 531; *Boston v. Richardson*, 13 Allen (Mass.) 146; *Wallace v. Goodall*, 18 N. H. 439; *Gilchrist v. McLaughlin*, 7 Ired. (N. C.) L. 310; *Kinley v. Crane*, 34 Pa. St. 146; *Clements v. Kyles*, 13 Gratt. (Va.) 468; *Davis v. Mason*, 4 Pick. 156; *Daggett v. Welley*, 6 Fla. 482.

General notoriety of character is competent to prove a neighbor's knowledge of such character. *Slattings v. Slate*, 33 Ala. 425.

of various kinds, which, under ordinary circumstances, would be rejected for want of originality, &c. But in order to guard against fraud, it is an established principle that such declarations, &c., must have been made "*ante litem motam*,"—an expression which has caused some difference of opinion, but which seems to mean before any controversy has arisen on the subject to which the declarations relate, whether such controversy has or has not been made the subject of a lawsuit. (*u*)<sup>1</sup> The value of this species of evidence manifestly depends on the degree of publicity of the matters in question; and also, when in a documentary shape, on the facilities or opportunities which may exist for substitution or fabrication.<sup>2</sup>

498. 3. Matters of pedigree; *e. g.*, the fact of relationship between particular persons; the births, marriages, and deaths of members of a family, &c., form the next exception. (*v*) "*Quoties quæreretur, genus vel gentem quis haberet, necne eum probare oportet.*" (*w*) These likewise partake of the nature of historical facts in this, that they usually refer to matters which have occurred in times gone by, and among persons

(*u*) 1 Phill. Ev. 194, 10th Ed.; Tayl. Ed.; Tayl. Ev. Part 2, ch. 9, 4th Ed. Ev. §§ 515 *et seq.*, 4th Ed.; Butler v. Att.-Gen. v. Kohler, 9 Ho. Lo. Cas. Lord Mountgarrett, 7 Ho. Lo. Cas. 654, 670. 633. (*w*) Dig. lib. 22, tit. 3, l. 1.

(*v*) 1 Phill. Ev. ch. 8, sect. 4, 10th

<sup>1</sup> Testimony touching reputation founded on opinions expressed *post litem motam*, must be excluded. Reid v. Reid, 17 N. J. Eq. 101. The declaration of a mother concerning her son, are admissible in a question of pedigree when not made *post litem motam*. Conjolle v. Ferrie, 26 Barb. (N. Y.) 177. Where, in an action of ejectment, the demandants claimed as heirs of an aunt, then deceased, her declarations to that effect were held admissible to show such relationship. Moffit v. Witherspoon, 10 Ired. (N. C.) L. 185.

<sup>2</sup> See *ante*, vol. i. part iii. p. 396.

who have passed away; though in attempting to prove them by derivative evidence, the check afforded by notoriety is wanting, seeing that they are matter of interest to only one, or at most a few families. Still the extreme difficulty of procuring any better evidence, compels the reception of this, when it comes from persons most likely to be acquainted with the truth, and under no temptation to misrepresent it.<sup>1</sup> Thus,

<sup>1</sup> Hearsay is evidence in matters of pedigree and relationship only when the facts are ancient and the witness of some kin, or has some personal knowledge of the family of the deceased. *Armstrong v. McDonald*, 10 Barb. 300; *Greenwood v. Spiller*, 3 Ill. (2 Seam.) 502; *Binney v. Ham*, A. K. Marsh. (Ky.) 322; *Speed v. Brooks*, 7 J. J. Marsh. (Ky.) 119; *Mooers v. Bunker*, 29 N. H. (9 Fost.) 420; *Emerson v. White*, Id. 482; *Waldron v. Tuttle*, 4 N. H. 371; *Jackson v. Cooley*, 8 Johns. (N. Y.) 128; *Kaywood v. Barnett*, 3 Dev. & B. (N. C.) L. 91; *Strickland v. Poole*, 1 Dall. 14; *Elliott v. Piersall*, 1 Pet. 328; *Kelly v. McGuire*, 15 Ark. 555; *Copes v. Pearce*, 7 Gill. (Md.) 247; *Craufurd v. Blackbun*, 17 Md. 49; *Chapman v. Chapman*, 2 Conn. 347. But such declarations, to be evidence of title, must not be general, but the particular relation. And see *Conjolle v. Ferrie*, 26 Barb. 177.

The hearsay testimony of living members of a family, and the hearsay of its deceased members, as to who were their ancestors, and as to the periods of their deaths, are entitled to more weight than the hearsay of persons unconnected with the family. *Saunders v. Fuller*, 4 Humph. (Tenn.) 516; *Jackson v. Browner*, 18 Johns. (N. Y.) 37. Although, in questions of pedigree, the declarations of deceased members of a family, as to marriages, are admitted; yet, where the marriage is to be shown as a substantive, independent fact, it is the general rule, as to the exclusion of hearsay evidence. *Westfield v. Warren*, 8 N. J. L. (3 Hals.) 249. But declarations of a third person, who can be called as a witness, can not be given in evidence to prove pedigree. *Jones v. Letcher*, 13 B. Mon. (Ky.) 363. In an action against an administrator for the residue of an estate, declarations of a deceased intestate were held competent to prove a particular person his relative, and the degree of consanguinity or affinity between them; but a conversation between deceased and another, in which each reckoned up their descents, when the deceased remarked, "If that be the



declarations of deceased members of a family, (x) made "ante litem motam," (y) and not made by the declarant obviously for his own interest; (z) the gen-

(x) Before such a declaration can be admitted in evidence, the relationship of the declarant *de jure*, by blood or marriage, must be established by some proof independent of the declaration itself; and it is for the judge to decide, whether this relationship is established. But it appears that evidence of the declaration is admissible, if there

be *prima facie* proof of the relationship of the declarant. *Plant v. Taylor*, 7 H. & N. 211, 237; *Hitchins v. Eardley*, L. Rep., 2 P. & D. 248.

(y) See 1 Phill. Ev. 206, 10th Ed.; *Gee v. Ward*, 7 E. & B. 509.

(z) Per Cur., *Plant v. Taylor*, 7 H. & N. 211, 238.

case, we are second cousins," is not admissible evidence for such purpose. *State v. Greenwell*, 4 Gill & J. (Md.) 407.

But to let in the declarations of third persons, in case of pedigree, it must be shown that they are dead. *White v. Strother*, 11 Ala. 720; *Baintree v. Hingham*, 1 Pick. 245.

The acts and declarations of a party are competent evidence against him when affording any presumption against him. *Phelan v. Bonham*, 9 Ark. 389; *Harvey v. Anderson*, 12 Ga. 69; *Jones v. Morgan*, 13 Ga. 515; *Pike v. Wiggin*, 8 N. H. 356; *Tenney v. Evans*, 14 N. H. 343. The declarations of one partner are admissible against himself. *Crossgrove v. Himmelrich*, 54 Pa. St. 203. And the declarations of a person are evidence against him, and all claiming under him by a subsequent title. He can not, by transferring it to another, affect the rights of those who have an interest in his confessions. *Guy v. Hall*, 3 Murph. (N. C.) 150; *Johnson v. Patterson*, 2 Hawks (N. C.) 183. It is competent to show that a party has given a false reason for his conduct, in order to aid the jury in inferring the true reason. *Tompkins v. State*, 17 Ga. 356. Statements of a party may be used by way of inducement or illustration of legal evidence. *Grines v. Talbot*, 1 A. K. Marsh. (Ky.) 205. Declarations of a party to the record in interest are admissible, and in the absence of fraud, if the parties have a joint interest in the matter in suit, an admission made by one is in general evidence against all. *Black v. Lamb*, 12 N. J. Eq. (1 Beas.) 108. These declarations are to be considered by the jury, who are to determine what weight shall be given them. *Dufield v. Cross*, 12 Ill. 397. A statement made by a party, in a deposition given by him in another cause, may be used in evidence against him, as an admission. *Brewer v. Hyndman*, 18 N. H. 9. And this although

eral reputation of a family proved by a surviving member of it; entries contained in books, such as family bibles, if produced from the proper custody, even although there be no evidence of the handwriting or authorship of such entries; (a) correspondence between relatives; recitals in deeds; descriptions in wills; inscriptions on tombstones, rings, monuments, or coffin-plates; charts of pedigrees, made or adopted by deceased members of the family, &c., have severally been held receivable in evidence for this purpose. (b) And it is impossible to dispense with this kind of evidence, especially in proof of remote and collateral matters; but tribunals should be on their guard, when the actual point in issue in a cause depends wholly or chiefly upon it. It is from its nature very much exposed to fraud and fabrication; and even assuming the declaration, inscription, &c., correctly reported by the medium of evidence used, many instances have shown how erroneous is the assumption that all the members of a family, especially in the inferior walks

(a) *Hubbard v. Lees*, L. Rep., 1 Ex. 255, 258. of A., that the plaintiff was A.'s natural son, was held to be inadmissible.

(b) In a suit in which the plaintiff alleged that he was the natural son of A., a declaration by a deceased brother & M. 109.

it relates to the contents of a writing. *Loomis v. Wadhams*, 8 Gray (Mass.) 557; *Smith v. Palmer*, 6 Cush. (Mass.) 513. Words uttered by a minister in his sermon are merely declarations in his own favor, and are not communicated to the society in its corporate capacity, and, though heard by the congregation without reply or comment, have no tendency to prove that they assented to its truth. *Johnson v. Trinity Church*, 11 Allen (Mass.) 123. And see *Doyle v. St. James's Church*, 7 Wend. (N. Y.) 178; *Marvin v. Richmond*, 3 Der. (N. Y.) 58; *State v. Bryson*, 1 Wins. (N. C.) 86; *Silvis v. Ely*, 3 Watts & S. (Pa.) 420; *McGill v. Ash*, 7 Pa. St. 297; *State v. Littlefield*, 3 R. I. 124; *Hardy v. De Leon*, 5 Tex. 211; *Wells v. Fairbanks*, Id. 582; *Hill v. Powers*, 16 Vt. 516; *Goodnow v. Parsons*, 36 Vt. 46.

of life, are even tolerably conversant with the particulars of its pedigree. (*c*)

499. 4. The next instance in which this rule is relaxed, seems to rest even more exclusively on the principle of necessity; namely, that ancient documents, purporting to constitute part of, or at least to have been executed contemporaneously with, the transactions to which they relate, are receivable as evidence of ancient possession, in favor of those claiming under them, and even against others who are neither parties nor privies to them. (*d*) "The proof of ancient possession is always attended with difficulty. Time has removed the witnesses who could prove acts of ownership of their personal knowledge, and resort must necessarily be had to written evidence." (*e*) In order to guard against the too manifest dangers of this kind of proof, it is established as a condition precedent to its admissibility, that the document must be shown to have come from the proper custody, *i. e.*, to have been found in a place in which, and under the care of persons with whom, it might naturally and reasonably be expected to be found; (*f*) although it is no objection that some other more proper place, &c., may be suggested. (*g*) The elder civilians applied, with tolerable justice, the term "*piscatio anguillarum*" to the proof of immemorial possession. (*h*)

500. 5. Declarations made by deceased persons against their own interest, are receivable in evidence in

(*c*) See the judgment of the Master of the Rolls in *Crouch v. Hooper*, 16 Beav. 182.

(*d*) 1 Phill. Ev. ch. 8, sect. 5, 10th Ed.; Tayl. Ev. Part 2, ch. 10, 4th Ed.

(*e*) Per Willes, J., delivering the opinion of the judges in *Malcomson v. D'Dea*, 10 Ho. Lo. Cas. 593, 614.

(*f*) *The Bishop of Meath v. The Marquess of Winchester*, 3 Bingh. N. C. 200, 202.

(*g*) *Id.*; *Croughton v. Blake*, 12 M. & W. 205; *R. v. Mytton*, 2 E. & E. 557.

(*h*) *Bonnier, Traité des Preuves*, § 732.

proceedings between third parties, (*i*) provided such declarations were made against proprietary (*j*) or pecuniary interest, (*k*) and do not derogate from the title of third parties; *e. g.*, a declaration made by a deceased tenant is not admissible, if it derogates from the title of the reversioner. (*l*)<sup>1</sup>

The admissibility of declarations against interest, made by parties to a suit, rests on a different principle. (*m*) The ground of this exception is, the improbability that a party would falsely make a declaration to fix himself with liability; but cases may be put where his doing so would be an advantage to him. *E. g.*, the accounts of the receiver or steward of an estate have, through neglect or worse, got into a state of derange-

(*i*) 1 Phill. Ev. ch. 8, sect. 7; Tayl. 341.  
Ev. Part 2, ch. 11, 4th Ed. The  
leading case on this subject is Higham  
v. Ridgway, 10 East, 109; set out and  
commented on in 21 Smith, Lead. Cas.  
271, 5th Ed.

(*k*) The Sussex Peerage case, 11 Cl.  
& F. 85. See *R. v. The Overseers of*  
*Birmingham*, 1 B. & S. 763.

(*l*) Papendick v. Bridgewater, 5 E. &  
B. 166.

(*j*) *R. v. Exeter*, L. Rep., 4 Q. B. (*m*) *Infra*, ch. 7.

<sup>1</sup> Declarations of a party do not bind those claiming under him by a right arising prior to the declarations, and are not evidence against such claimants. *Howard v. Snelling*, 32 Ga. 195. To render the entry or declaration of a deceased person evidence between third persons, it must have been made without any interest to mistake facts, and—unless in cases of pedigree, custom, boundary, and prescription—against the interest of the person making it; and so ancient as to preclude a suspicion that it was made for the occasion. *Gilchrist v. Martin*, 1 Bailey (S. C.) Eq. 492. Declarations of one in possession of land, whether as tenant or proprietor, are evidence against those who derive their title through him, of the manner in which the land has been occupied; *Beecher v. Parmele*, 9 Vt. 352; the title arising since such admissions; *Mullekin v. Greer*, 5 Mo. 489; *Fratick v. Presley*, 29 Ala. 457; *Meek v. Holton*, 22 Ga. 491. Declarations against the interest of the party making them, that he holds as tenant or trustee for another, are admissible against him, and those who succeed to his rights or estate. *Brewer v. Brewer*, 19 Ala. 481.

ment, which it is desirable to conceal from his employer ; and one very obvious way of setting the balance straight, is falsely charging himself with having received money from a particular person. <sup>1</sup>

**501. 6.** Allied to these are declarations in the regular course of business, office, or employment, by deceased persons, who had a personal knowledge of the facts, and no interest in stating an untruth. (*n*) But the rule as to the admission of such evidence, is confined strictly to the particular thing which it was the duty

(*n*) 1 Phill. Ev. ch. 8, sect. 8 ; Tayl. to the case of *Price v. The Earl of*  
Ev. Part 2, ch. 12, 4th Ed. For the *Torrington* (reported 1 Salk. 285 ; 2  
authorities on this subject, see the note *Ld. Raym. 873 ; Holt, 300*).  
in 1 Smith, Lead. Cas. 277, 5th Ed.,

<sup>1</sup> But the statements of third parties, appearing to have been made against their interest, are not admissible, unless the parties are shown to be dead at the time of the trial. *Lowry v. Moss*, 1 Strobb. (S. C.) 63. And see as to such declarations between third parties, *Allegheny v. Nelson*, 25 Pa. St. 332 ; *Taylor v. Gould*, 57 Id. 152 ; *Coleman v. Frazier*, 4 Rich. (S. C.) 146 ; *Cruger v. Daniel*, 1 McMull. (S. C.) Eq. 157 ; *White v. Chouteau*, 1 E. D. Smith (N. Y.) 493 ; *Pease v. Jenkins*, 10 Ired. (N. C.) L. 355. The declarations of a person not a party, who is living, and a competent witness in the cause, though against his interest at the time they were made, are inadmissible. *Fitch v. Chapman*, 10 Conn. 8 ; *Wiswall v. Kenevals*, 18 Ala. 65 ; *S. P. Barker v. Coleman*, 35 Ala. 221 ; *Bailey v. Wood*, 24 Ga. 164 ; *Macon, &c. R. R. Co. v. Davis*, 27 Ga. 113 ; *Coble v. McDaniel*, 33 Mo. 363 ; *Redman v. Roberts*, 1 Ired. (N. C.) L. 479 ; *Gordon v. Bowers*, 16 Pa. St. 226. Reputation or hearsay on matters concerning private titles, is not admissible, unless to affect with notice one claiming to be an innocent purchaser, if shown to have been in a condition to have heard of it, as a circumstance to charge him with notice. *Blagg v. Hunter*, 15 Ark. 246. Admissions of a person who can not be compelled to testify, and whose declarations are against his own interest, will be received as though he were dead. *Harriman v. Brown*, 8 Leigh, 697. Answers, against his interest, made by a bankrupt, on oath, at his examination, are admissible. *Union Canal Co. v. Loyd*, 4 Watts & Serg. 369

of the person to do; and, unlike a statement against interest, does not extend to collateral matters, however closely connected with that thing. (*o*) And it is also a rule with regard to this class of declarations, that they must have been made contemporaneously with the acts to which they relate. (*p*)

**502.** In both classes, viz., declarations against interest, and declarations in the regular course of business, &c., the evidence commonly appears in a written form; and it has even been made a question whether this is not essential to its admissibility. (*q*) But the inclination of the authorities is rather to the effect that verbal declarations, answering, of course, all other requisite conditions, are equally receivable; (*r*) and, indeed, it seems difficult to establish a distinction in principle between the cases.

**503.** 7. The civil law, (*s*) and the laws of some other countries, (*t*) receive the books of tradesmen, made or purporting to be made by them in the regular course of business, as evidence to prove a debt against a customer or alleged customer. Sensible of the weak-

(*o*) Per Blackburn, J., *Smith v. Blakey*, L. Rep., 2 Q. B. 326, 332.

(*p*) *Deo d. Patteshall v. Turford*, 3 B. & Ad. 898, per Parke, J.; *Short v. Lee*, 2 Jac. & W. 475, per Sir T. Plumer, M. R.

(*q*) *Fursdon v. Clogg*, 10 M. & W. 572.

(*r*) *Sussex Peerage case*, 11 Cl. & F. 113, per Ld. Campbell; *Stapylton v. Clough*, 2 E. & B. 933; *Eddie v. Kingsford*, 14 C. B. 759, 763.

(*s*) Heinec. ad Pand. pars 4, § 134; 1 Ev. Poth. § 719. This is the well-known doctrine of the civilians, which was implanted by them in most countries of Europe, and at one period seems to have obtained a footing in our

own. See 7 Jac. 1, c. 12. But it may well be a question whether the doctrine was derived from the Roman law; if so it is wholly at variance with the principles laid down in other parts of the *Corpus Juris Civilis*. E. g. "Exemplo perniciosum est, ut ei scripturæ credatur, quâ unusquisque sibi adnotatione propriâ debitorem constituit. Unde neque fiscum, neque alium quemlibet ex suis subnotationibus debiti probationem, præbere posse oportet." Cod. lib. 4, tit. 19, l. 7. "Factum cuique suum, non adversario nocere debet." Dig. lib. 50, tit. 17, l. 155. See also Dig. lib. 2, tit. 14, l. 27 § 4; Cod. lib. 7, tit. 60, ll. 1, & 2.

(*t*) Tayl. Ev. §§ 641-3, 4th Ed.

ness and danger of this sort of evidence, the civilians only allowed it the force of a semi-proof; and, by thus investing it with an artificial value, increased the danger of receiving it. (*u*) There is no analogy between entries made in his books by a living tradesman, and entries made in those books by a clerk or servant who is deceased, and who, in making them, probably charged himself to his master. And turn or torture this question as we will, to admit the former is a violation of the rule alike of law and common sense, that a man shall not be allowed to manufacture evidence for himself. (*x*) It is true that tradesmen's books are usually kept with tolerable, and in some instances with great accuracy; but may not the reason of this be, that as the law will not allow them to be used for the purpose of fraudulently charging others, they are now kept for the sole and bona fide purpose of refreshing the memory of the tradesman as to what goods he has supplied? Besides, it is to be observed that almost all the advantage derivable from tradesmen's books, with little or none of their danger, is obtained under the law as it now stands. For not only may the tradesman appear as a witness, (*y*) and use his books as memoranda to refresh his memory with respect to the goods supplied, (*z*) but those books are always available as "indicative" evidence; (*a*) and especially in the event of the bankruptcy of the tradesman, they are often found of immense value to himself or those who represent him.

**504. 8.** Books of a deceased incumbent—rector or vicar—containing receipts and payments by him relative

(*u*) Heinec. in loc. cit. See Bentham's comment on the civil law practice in this respect, 5 Jud. Ev. 481, 482; and *supra*, Introd. pt. 2, § 70, note (*f*).

(*x*) *Infra*, ch. 5 and ch. 7.

(*y*) Bk. 2, pt. 1, ch. 2.

(*z*) Bk. 2, pt. 3, ch. 1.

(*a*) For "indicative evidence" see bk. 1, pt. 1, § 93.

to the living, have frequently been held receivable in evidence for his successors. (*b*) This has been complained of as anomalous; (*c*) but the admissibility of such evidence was fully recognized in the comparatively recent case of *Young v. The Master of Clare Hall*; (*d*) where, however, the court assigned no reason for their decision, apparently deeming the question settled by authority. So evidence has been admitted, of declarations by a deceased rector, as to a custom in the parish relative to the appointment of churchwardens. (*e*)

**505.** 9. The last exception to this rule is that of declarations made by persons under the conviction of their impending death. (*f*) "*Nemo moriturus præsumitur mentiri*" (*g*)—the circumstances under which such declarations are made, may fairly be assumed to afford a guarantee for their truth, at least equal to that of an oath taken in a court of justice. Hence the dying declarations of a child of tender years will be rejected, unless he appears to have had that degree of religious knowledge, which would render his evidence receivable; (*h*) as likewise will those of an adult, whose character shows him to have been a person not likely to be affected with a religious sense of his approaching dissolution. (*i*)<sup>1</sup>

The principal objection, however, to second-hand evidence is, not that it is not guarded by an oath, but

(*b*) See the cases collected, 1 Phill. 187; 1 Phill. Ev. ch. 8, sect. 6, 10th Ed.; Tayl. Ev. Part 2 ch. 13, 4th Ed.

(*c*) 1 Ph. Ev. in loc. cit.

(*g*) 2 Ho. St. Tr. 18.

(*d*) 17 Q. B. 529.

(*h*) Bk. 2 pt. 1, ch. 2.

(*e*) *Bremner v. Hull*, L. Rep., 1 C. P. 748.

(*i*) 1 Phil. Ev. 242, 10th Ed.; Appleton, Evid. 203 note (*v*).

(*f*) *R. v. Jenkins*, L. Rep., 1 C. C.

<sup>1</sup> See *ante*, vol. i., note 1, p. 113, for a full statement of American authorities as to the credibility to be attached to dying declarations.



that the party against whom it is offered is deprived of his power of cross-examining, and the jury of the opportunity of observing the demeanor of the person whose testimony is relied on. Besides, if the solemnity of the occasion on which dying declarations are made, constituted their sole ground of admissibility, it would not be confined, as it appears to be by law, to a solitary class of cases, *i. e.*, charges of homicide, where the language of the deceased, referred to the injury which he expected would shortly cause his death. (*k*) Two other reasons plead for the reception of this evidence in those cases. 1. The difficulty of procuring better proof of the fact—the injured party being no more, the most obvious and direct source of evidence has perished. 2. Although society has an immense interest in punishing crimes of such magnitude, the witnesses who appear to prove them, rarely have an interest in putting into the mouths of the dying persons, language which they did not use. In civil matters it is far otherwise; as fatal experience has taught men, in all countries where nuncupative wills have been allowed.

(*k*) *R. v. Mead*, 2 B. & C. 605, 608; received in civil proceedings, seem to  
*R. v. Hind*, Bell, C. C. 253. Some old be overruled by *Stobart v. Dryden*, 1  
 cases in which such declarations were M. & W. 615, 626.

## CHAPTER V.

EVIDENCE AFFORDED BY THE WORDS OR ACTS OF  
OTHER PERSONS.

|  | PARAGRAPH |
|--|-----------|
| Maxim "Res inter alios acta alteri nocere non debet" . . . . .               | 506       |
| Other forms form of it . . . . .   | 506       |
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| Instances illustrative of the rule "res inter alios acta, &c." . . . .       | 509       |
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**506.** "Res inter alios acta alteri nocere non debet."(a) "Res inter alios actæ alteri nocere non debet."<sup>1</sup>

(b) No person is to be affected by the words or acts of others, unless he is connected with them either personally, or by those whom he represents or by whom he is represented. To the above forms of the maxim, some books add, "*sed quandoque prodesse potest*," (c)<sup>2</sup> or "*sed prodesse possunt*;" (d) and in some it runs, "*nec nocere nec prodesse possunt*." (e)<sup>3</sup> These addi-

(a) Co. Litt. 152 b, 319 a; 2 Inst. 513; 6 Co. 51 b; Broom's Max. 857, 3rd Ed. This rule was well known at Rome. "Inter alios res gestas aliis non posse præjudicium facere, sæpe constitutum est." Cod. lib. 7, tit. 60, l. 1. "Inter alios factam transactionem, absenti non posse facere præjudicium, notissimi juris est." Id. l. 2. See also Dig. lib. 2, tit. 14, l. 27, § 4.

So in the canon law, "Res inter alios acta aliis præjudicium regulariter non adfert." Lancel. Inst. Jur. Can. lib. 3. tit. 15, § 10.

(b) 12 Co. 126.

(c) Wingate's Max. 327.

(d) 6 Co. 1 b.

(e) 4 Inst. 279. See also Bonnier *Traité des Preuves*, § 692; and Cod. lib. 7, tit. 56, l. 2.

<sup>1</sup> Things done between strangers ought not to injure those parties.

<sup>2</sup> They may benefit them, however.

<sup>3</sup> They should neither injure nor benefit them.

tions are, however, unnecessary ; for the rule is only of general, not universal application, there being several exceptions both ways. Neither does the expression “inter alios,” mean that the act must be the act of more than one person ; it being also a maxim of law “factum unius alteri nocere non debet.” (*f*) And the Roman law, from which both maxims were probably taken, expressly says, “Exemplo perniciosum est, ut ei scripturæ credatur, qua unusquisque sibi adnotatione propria debitorum constituit.” (*g*) Nor does it make any difference that the act was done or confirmed by oath, —“jusjurandum inter alios factum nec nocere, nec prodesse debet ;” (*h*)—consequently the sworn evidence of a witness in one cause or proceeding, can not be made available in another cause or proceeding between other parties. One important branch of this rule, “res inter alios judicata alteri nocere non debet,” will be more properly considered under the head of res judicata. (*i*) When the person whose words or acts are offered in evidence, is also the opposite party to the suit, the evidence is further inadmissible by virtue of another important principle—that no man shall be allowed to make evidence for himself ; (*j*) which also is in accordance with the Roman law, where it is laid down, “Factum cuique suum, non adversario nocere debet.” (*k*)

**507.** Following out the great principle which exacts the best evidence, it is obvious that things done inter alios or ab alio, are even more objectionable than derivative or second-hand evidence. The two are, indeed, sometimes confounded ; but there is this distinction be-

(*f*) Co. Litt. 152b.

(*g*) Cod. lib. 4, tit. 19, l. 7 ; 1 Ev. Poth. § 724.

(*h*) 4 Inst. 279. See Dig. lib. 12, tit.

2, l. 3, § 3, and l. 9, § 7, and l. 10.

(*i*) *Infra*, ch. 9.

(*j*) See *infra*, ch. 7.

(*k*) Dig. lib. 50, tit. 17, l. 155.

tween them ; that derivative or second-hand evidence indicates directly a source of legitimate evidence, while *res inter alios acta* either indicates no such source, or at most does so only indirectly. Suppose, for instance, that on an indictment for larceny, A. were to depose that he heard B. (a person not present), say that he saw the accused take and carry away the property ; this evidence is objectionable as being offered *obstetricante manu*, but it indicates a better source, namely, B. Suppose, however, that C. were to depose that he overheard two persons unknown, forming a plan to commit the theft in question, in which they spoke of the accused as an accomplice who would assist them in its execution ; this evidence is but *res inter alios acta*, for it shows no better source of legal proof ; although as indicative evidence, and thus putting officers of justice, &c., on a track, it certainly might not be without its use.

508. There is likewise this point of resemblance between second-hand evidence and *res inter alios acta*, that the latter, like the former, must not be understood as excluding proof of *res gestæ*. The true meaning of the rule under consideration is simply this, that a party is not to be affected by what is done behind his back. Thus, if the question between plaintiff and defendant were, whether the former had paid a sum of money to D. ; a receipt by D., acknowledging payment to him by the plaintiff of the money in question, would not, *per se*, be evidence of such payment as against the defendant, it being *res inter alios acta* ; and yet it would be admissible, as part of the *res gestæ*, for the purpose of proving such payment. (1) So when the matter in issue consists of an act,

(1) *Carmarthen & Cardigan Railway Co., L. Rep., 8 C. P. 685.*  
*Co. v. Manchester & Milford Railway*

which is separable from the person of the accused, who is nevertheless accountable for it, proof may be given of that act before he is connected with it by evidence. This may be illustrated as follows. Offenses, as has been shown in a former place, (*m*) are rightly divisible into *delicta facti permanentis* and *delicta facti transeuntis*, *i. e.*, into offenses which leave traces or marks; such as homicide, arson, burglary, &c.; and offenses which do not; such as conspiracy, criminal language, and the like. With respect to the former, it is every day's practice to give proof of a *corpus delicti*—that a murder, an arson, a burglary, &c. was committed—before any evidence is adduced affecting the accused, although without such evidence the antecedent proof of course goes for nothing. And the same holds when the offense is *facti transeuntis*. Thus, on an indictment for libel, proof may first be given of the libel, and the defendant may then be shown to have been the publisher of it. Another illustration is afforded by prosecutions for conspiracy, where it is a settled rule, that general evidence may be given to prove the existence of a conspiracy, before the accused is shown to be connected with it; (*n*) for here the *corpus delicti* is the conspiracy, and the participation of the accused is an independent matter which may or may not exist. The rule that the acts and declarations of conspirators are evidence against their fellows, rests partly on this principle, and partly on the law of principal and agent. The following summary of the practice, taken from an approved work, (*o*) is fully supported by authority. "Where several persons are proved to have combined together for the same illegal purpose,

(*m*) *Supra*, ch. 2, sect. 3, sub-sect. 2. 1 Fost. & F. 213.

(*n*) See the authorities collected in (o) 3 Russ. on Cr. 161, 4th Ed. See Rosc. Crim. Ev. 389, 5th Ed.; also R. v. Blake, 6 Q. B. 126; R. v. Esdaile, also Phill. & Am. Ev. 210, 434; Tayl. Ev. 527-532, 4th Ed.

any act done by one of the party, in pursuance of the original concerted plan, and with reference to the common object, is in contemplation of law the act of the whole party; and, therefore, the proof of such act would be evidence against any of the others who were engaged in the same conspiracy; and, further, any declarations made by one of the party at the time of doing such illegal act, seem not only to be evidence against himself, as tending to determine the quality of the act, but to be evidence also against the rest of the party, who are as much reponsible as if they had themselves done the act. But what one of the party may have been heard to say at some other time, as to the share which some of the others had in the execution of the common design, or as to the object of the conspiracy, can not, it is conceived, be admitted as evidence to affect them on their trial for the same offense. And, in general, proof of concert and connection must be given, before evidence is admissible of the acts or declarations of any person not in the presence of the prisoner. It is for the court to judge whether such connection has been sufficiently established; but when that has been done, the doctrine applies, that each party is an agent for the other, and that an act done by one in furtherance of the unlawful design, is in law the act of all, and that a declaration made by one of the parties, as the time of doing such an act, is evidence against the others." And this is in accordance with the law in other cases; for if several persons go out with the common design of committing an unlawful act, anything done by one of them in prosecution of that design, though not in presence of his fellows, is in law the act of them all. (p)

• (p) 1 Hale, P. C. 462 *et seq.*; Fost. son, 1 Leach, C. L. 6; 4 Blackst C. L. 349-350, 353-354; R. v. Hodg- Comm. 34.

**509.** The rule "*res inter alios acta alteri nocere non debet*," is so elementary in its nature that a few instances will suffice for its illustration. (*q*) Sir Edward Coke gives the following: "If a man make a lease for life, and then grant the reversion for life, and the lessee attorn, and after the lessor disseise the lessee for life, and make a feoffment in fee, and the lessee re-enter, this shall leave a reversion in the grantee for life, and another reversion in the feoffee, and yet this is no attornment in law of the grantee for life, because he doth no act, nor assent to any which might amount to attornment in law. *Et res inter alios acta &c.*" (*r*) Where several persons are accused or suspected of a criminal offense, (*s*) or sued in a civil court, (*t*) a confession or admission by one in the absence of his fellows is no evidence against them. So where, on an appeal of robbery against A, the jury acquitted the defendant, and found that B and C abetted the appellant to bring the false appeal; as B and C were strangers to the original, they were not concluded by this finding; "but," adds the report, "they shall be distrained *ad respondendum*," (*u*)—a good instance of the value of *res inter alios acta*, as indicative, however dangerous it would be as legal evidence.<sup>1</sup>

(*q*) The reader desirous of more will find a large number collected in Wingate's *Maxims*, p. 327.

(*r*) Co. Litt. 319a.

(*s*) Kely. 18; 9 Ho. St. Tr. 23.

(*t*) Godb. 326, pl. 418; Hemmings v. Robinson, 1 Barnes' Notes, 317.

(*u*) Old record of Mich. 42 Edw. III. set out 12 Co. 125, 126.

<sup>1</sup> So admissions made with a view to a compromise (*Wood v. Wood*, 3 Ala. 756; *Wilson v. Hines*, 1 Minor (Ala.) 255; *Rideout v. Newton*, 17 N. H. 71; *Perkins v. Concord R. R.*, 44 N. H. 223; *Williams v. Thorp*, 8 Cow. (N. Y.) 201; *Stat v. Dutton*, 11 Wis. 371) are *res inter alios acta*, and evidence of their nature may be submitted. In case of a fraudulent combination between the assignor and assignee, the declara-

**510.** We have said that there are exceptions to this rule. Thus, although in general strangers are not bound by, and can not take advantage of estoppels, yet it is otherwise when the estoppel runs to the disability or legitimation of the person. (*x*) So a judgment in rem, in the Exchequer, is conclusive against all the world: (*y*) as also was a fine after the period of non-claim had elapsed. (*z*) The admissibility in evidence of many documents of a public and quasi public nature, is at variance with this principle, which is then brought in collision with the maxim "*omnia præsumuntur rite esse acta*:" and the number of them has been much increased by statute, especially in late years. (*a*) The following decided exception is also given by Littleton: (*b*)—"if there be lord, mesne, and tenant, and the tenant holdeth of the mesne by the service of five shillings, and the mesne holdeth over by the service of

(*x*) *Infra*, ch. 7, sect. 2.

(*y*) *Infra*, ch. 9.

(*z*) 2 Blackst. Comm. 354.

(*a*) See bk. 1, pt. 2.

(*b*) Sect. 231.

tions of the assignor, after the assignment, are binding on the assignee. *Cuyler v. McCartney*, 33 Barb. (N. Y.) 165; *O'Neil v. Glover*, 5 Gray (Mass.) 144. As a general rule, the admissions or declarations of a person not a party to the record, are not admissible in evidence in the absence of better testimony. *Ibbitson v. Brown*, 5 Iowa, 532; *Chastain v. Robinson*, 30 Ga. 55; *Berry v. Waring*, 2 Har. & J. (Md.) 103; *Lyman v. Gipson*, 18 Pick. (Mass.) 422; *Bain v. Clark*, 39 Mo. 252; *Forsaith v. Stickney*, 16 N. H. 575. *Jones v. Doe*, 2 Ill. (1 Scam.) 276; *McCormick v. Robb*, 24 Pa. St. 44; *Kottwitz v. Bagby*, 16 Tex. 656; *Wesson v. Washburn Iron Co.*, 13 Allen, 95. One man can not be bound by the admissions of another, unless such a relation is previously, and by other evidence, proved to exist between them as will enable one to involve the other in liabilities. *Kilburn v. Ritchie*, 2 Cal. 145; *Atwell v. Miller*, 11 Md. 348; *Commonwealth v. Oberle*, 3 Serg. & R. (Pa.) 9; *Hill v. Myers*, 43 Pa. St. 170; *Faulkner v. Whitaker*, 15 N. J. L. (3 Green) 438.



twelve pence, if the lord paramount purchase the tenancy in fee, then the service of the mesnalty is extinct ; because that when the lord paramount hath the tenancy, he holdeth of his lord next paramount to him, and if he should hold this of him which was mesne, then he shall hold the same tenancy immediately of divers lords by divers services, which should be inconvenient, and the law will sooner suffer a mischief than an inconvenience, and therefore the seignory of the mesnalty is extinct." On this Sir Edward Coke observes, (c)—" It is holden for an inconvenience, that any of the maxims of the law should be broken, though a private man suffer loss ; for that by infringing of a maxim, not only a general prejudice to many, but in the end a public uncertainty and confusion to all would follow. And the rule of law is regularly true, *res inter alios acta alteri nocere non debet, et factum unius alteri nocere non debet* ;<sup>1</sup> which are true with this exception, unless an inconvenience should follow." And another old book lays down as maxims, "*Privatum incommodum publico bono pensatur*." (d)<sup>2</sup>—" *Privatum commodum publico cedit*." (e)<sup>3</sup>

(c) Co. Litt. 152 b.

(e) Jenk. Cent. 5, Cas. 80.

(d) Jenk. Cent. 2, Cas. 65.

<sup>1</sup> See *ante*, p. 856, note 1.

<sup>2</sup> Private loss is over-balanced by public good.

<sup>3</sup> Let private convenience yield to public good.

## CHAPTER VI.

## OPINION EVIDENCE.

|   | PARAGRAPH |
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**511.** The use of witnesses being to inform the tribunal respecting facts, their opinions are not in general receivable as evidence. (*a*) This rule is necessary, to prevent the other rules of evidence being practically nullified. Vain would it be for the law to constitute the jury the triers of disputed facts, to reject derivative evidence when original proof is withheld, and to declare that a party is not to be prejudiced by the words or acts of others with whom he is unconnected, if tribunals might be swayed by opinions relative to those facts, expressed by persons who come before them in the character of witnesses. If the opinions thus offered are founded on no evidence, or on illegal evidence, they ought not to be listened to; if founded on legal evidence, that evidence ought to be laid before the jury,

(*a*) Peake Evid. 195, 5th Ed.; Ph. & Ed.; 3 Burr. 1918; 5 B. & Ad. 846, Am. Evid. 899; 1 Phill. Evid. 520, 847; and the authorities in the following notes.  
10th Ed.; 1 Greenl. Evid. § 440, 7th

whom the law presumes to be at least as capable as the witnesses, of drawing from them any inferences that justice may require.<sup>1</sup> “*Testes rationem scientiæ reddere teneantur.*” (*b*) “*Lestestm doivent rien tesm fors ceo que ils soient de certain, s. ceo que ils veront ou oyront.*” (*c*) “*Omne sacramentum debet esse certæ scientiæ.*” (*d*) “It is no satisfaction for a witness to say that he thinks, or persuadeth himself, and this for two reasons. First. Because the judge is to give an absolute sentence, and for this ought to have a more sure ground than thinking. Secondly. The witness can not be sued for perjury.” (*e*)

512. This rule must not, however, be misunderstood;—nothing being further from the design of the law, than to exclude from the cognizance of the jury, anything which could legitimately assist them in forming a judgment on the facts in dispute. The meaning of the rule is simply that questions shall not be put to a witness which, by substituting his judgment for theirs, virtually put him in the place of the jury. A good illustration of its real nature is afforded by the case of *Daines and another v. Hartley.* (*f*) That was an action for slandering the plaintiffs in their trade. At the trial a witness deposed to the following words, as having been spoken by the defendant relative to some bills given by the plaintiffs to a firm of which the witness was member: “You must look out sharp that those bills are met by them.” The counsel for the plaintiffs then proposed to ask, “What did you understand by that?” which question was objected to, and disallowed by the judge. A rule for a new trial was afterwards obtained,

(*b*) Heinec. ad Pand. pars 4, § 144.

(*e*) Dyer, 53b, pl. 11, in marg. Ed

(*c*) Per Thorp, C. J., 23 Ass. pl. 11. 1688.

(*d*) 4 Inst. 279.

(*f*) 3 Exch. 200.

<sup>1</sup> Every oath ought to be grounded on certain knowledge.

on the ground that the question was improperly rejected: which, after argument, was discharged: and the following judgment was delivered by Pollock, C. B., in the name of the court: "There can be no doubt that words may be explained by bystanders to import something very different from their obvious meaning. The bystanders may perceive that what is uttered in an ironical sense, and therefore, that it may mean directly the reverse of what it professes to mean. Something may have previously passed, which gives a peculiar character and meaning to some expression; and some word which ordinarily or popularly is used in one sense, may, from something that has gone before, be restricted and confined to a particular sense, or may mean something different from that which it ordinarily and usually does mean. But the proper course for a counsel, who proposes to get rid of the plain and obvious meaning of words imputed to a defendant, as spoken of the plaintiff, is to ask the witness, not 'What did you understand by those words?' but 'Was there anything to prevent those words from conveying the meaning which ordinarily they would convey?' because, if there was, evidence of that may be given; and then the question may be put. When you have laid the foundation for it, the question then may be put, 'What did you understand by them?' when it appears that something occurred, by which the witness understood the words in a sense different from their ordinary meaning. I believe we may say, that generally no question ought to be put in such a form as possibly to lead to an illegal answer. Now, taken by itself, and without more, the understanding of a person who hears an expression is not the legal mode by which it is to be explained. If words are uttered or printed, the ordinary sense of those words is to be taken to be

the meaning of the speaker; but no doubt a foundation may be laid, by showing something else which has occurred: some other matter may be introduced, and then when that has been done, the witness may be asked, with reference to that other matter, what was the sense in which he understood the words. But the mere question, 'What did you understand with reference to such an expression?' we think is not the correct mode of putting the question."

**513.** The rule is not without its exceptions. Being based on the presumption, that the tribunal is as capable of forming a judgment on the facts as the witness, when circumstances rebut this presumption the rule naturally gives way—"Cessante ratione legis, cessat ipsa lex." (*g*) 1. On questions of science, skill, trade, and the like, persons conversant with the subject-matter—called by foreign jurists "experts," an expression now naturalized among us,—are permitted to give their opinions in evidence.<sup>1</sup> This rests on the

(*g*) Co. Litt. 79b.

<sup>1</sup> This rests upon the necessities of the case. *Slater v. Wilcox*, 57 Barb. 604. *Rochester, &c. R. R. Co. v. Budlong*, 10 How. Pr. 289; *Reed v. Hobbs*, 2 Scam. 297; *McKee v. Nelson*, 4 Cowen, 355. To render one an expert, however, the pursuit in which he is engaged must be one of science, skill, trade, or the like. See *Grigsley v. Clear Lake, &c. Co.*, 40 Cal. 376. A brakeman on a railroad is not an expert. *Hamilton v. Des Moines, &c. R. R. Co.*, 36 Iowa, 81. *Muldowney v. Illinois, &c. R. R. Co.*, Id. 462. Nor is one justice of the peace an expert as to the question of fees due another justice of the peace. *Evans v. Story County*, 35 Iowa, 126. While undoubtedly it must appear that a witness called as an expert has enjoyed some means of special knowledge or experience upon the subject in question, no rule can be laid down as to its extent. *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146. Though a physician may testify as an expert as to his opinion formed by reading and study alone. *State v. Wood*, 53 N. H. 484.

maxim "cuilibet in sua arte perito est credendum:" (*h*)<sup>1</sup> and the principle has been thus stated, (*i*) viz., that "the opinion of witnesses possessing pēculiar skill is admissible, whenever the subject-matter of inquiry is such, that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it."<sup>2</sup> A large number of instances of the application of this principle, are to be found in the books. The opinions of medical men are constantly admitted as to the cause of disease or of death; or the consequence of wounds; or with respect to the sane or insane state of a person's mind, as collected from a number of circumstances; and on other subjects of professional skill. (*h*)<sup>3</sup> But where scien-

(*h*) Co. Litt. 125a; 4 Co. 29a; Calvin's case, 7 Co. 19a.

(*i*) 1 Smith's Lead. Cas. 491, 5th Ed.; and see, per Lord Ellenborough, Beckwith v. Sydebotham, 1 Camp. 116, 117, and note (*a*), to Fenwick v. Bell, 1 C. & K. 313.

(*h*) 1 Greenl. Ev. § 440, 7th Ed. The practice of resorting to this species of scientific evidence, is by no

means a modern invention. In the 28 Ass. pl. 5, on an appeal of maihem, the defendant prayed that the court would see the wound, to see if there had been a maiming or not. And the court did not know how to adjudge because the wound was new, and then the defendant took issue, and prayed the court that the maihem might be examined; on which a writ was sent

<sup>1</sup> Every man is considered skillful in his own profession. See *post*, note 3.

<sup>2</sup> Experts, it has been said, are persons instructed by experience. So experts are competent to testify as to whether it is possible to examine all the layers in a case of old tobacco, without injuring the tobacco. *Atwater v. Clancy*, 107 Mass. 369. And see *post*, cases cited in note 1, page 876. The admission or rejection of the evidence of a witness called as an expert is in the sound discretion of the court, and except in a clear and very strong case, will not be reversed on appeal. *Sorg v. First German, &c. Congregation*, 63 Pa. St. 156.

<sup>3</sup> It has been held that it is not necessary that the witness

tific men are called as witnesses, they can not give their opinions as to the general merits of the cause, but only their opinions upon the facts proved. (1)<sup>1</sup> Seal

to the sheriff, to cause to come "Medicos, chirurgicos de melioribus London. 125. regis injungerentur." See also Plowd. ad informandum dominum regem et (1) 1 Geenl. Ev. § 440, 7th Ed.; curiam de his, quæ eis ex parte domini M'Naghten's case, 10 Cl. & F. 200.

should be engaged in the practice of his profession or science, and that it is sufficient if he has studied it; the fact that a witness who has studied medicine is not in practice, goes to his credit and not to his competency. *Tullis v. Kidd*, 12 Ala. 648. The rule as to when and upon what subjects experts may testify, is matter of law; but whether a witness has such qualifications as the rule may require, is a question of fact. *Jones v. Tucker*, 41 N. H. 546.

<sup>1</sup> And so a professional witness may give his opinion as to the sanity of a party, drawn from the result of his own observations, but not his opinion as based upon facts stated by other witnesses. *Dunham's appeal*, 27 Conn. 193. And see *Clary v. Clary*, 2 Ired. R. 78. Nor can an expert give his opinion upon statements made to him by parties out of court, who were not under oath. *Heald v. Thing*, 45 Me. 392. Except that often standard medical books are admissible, as evidence of the author's opinion upon a question of medical skill and practice involved in the trial of a cause. *Bowman v. Woods*, 1 Green (1 Iowa) 441. See, however, *Luning v. State*, 1 Chand. (Wis.) 178, which holds that statements in scientific books, not verified by the witness's actual experience, are not evidence of anything more than the author's opinion, and therefore not legal evidence. This case also holds that it is wholly within the discretion of the court to hear or reject the reading of scientific books on the hearing of a cause.

Such experts are not allowed to give their opinions upon controverted facts, but counsel may put to them a state of facts and ask their opinions thereon; *United States v. McGlue*, 1 Curtis Ct. Ct. 1; even if the case be hypothetical; *Luning v. State*, 1 Chand. (Wis.) 178; *Lake v. People*, 1 Parker's Cr. R. 495; but under proper instructions to the jury as to its application to the issue. *Crawford v. Wolf*, 29 Iowa, 567. A medical expert who has heard facts stated in evidence, about which there is no dispute, may give his opinion concerning them; but if the facts are disputed, the case must be put to him hypothetically. *State v. Klinger*, 46 Mo. 224; *Carpenter v. Blake*, 2 Lans. 206.

engravers may be called to give their opinion upon an impression, whether it was made from an original seal or from an impression; the opinion of an artist is evi-

In the trial of Mrs. Wharton, on a charge of poisoning General W. S. Ketchum (Pamphlet, p. 108), Mr. Hagner, of prisoner's counsel, read to the witness the following hypothetical case and interrogatory :

"A gentleman about fifty-eight years of age, residing on the Heights of Georgetown, D. C., on the morning of the 24th of June, 1871, at 7 o'clock, A. M., was in Washington city, more than a mile-and-a-half from his home, having already breakfasted. After other occupations, he called about 12, M., at an office more than a mile further off, and there he was engaged about important business, in completing which he walked about a mile-and-a-half further. The day was excessively warm, and he seemed to be much heated. He took no dinner. He came over to Baltimore in an afternoon train, and after reaching there, drove and walked about a mile from the depot to his lodgings, and immediately walked out again, and was absent some time. Between 8 and 9 o'clock, P. M., he partook of a hearty meal of meat, biscuits, coffee, &c., of which raspberries were the concluding course, and after smoking and talking with his friends until 11 o'clock, P. M., he retires to bed. Some hours afterwards he is taken sick, and leaves his room, and walks downstairs into the yard.

"Sunday morning, though still complaining of not feeling well, he goes out, visits a friend, and remains for some time. He then returns, indisposed. Between 8 and 9 o'clock, P. M., he drinks a glass of lemonade, with brandy in it, and, after an hour or two, retires to bed. During the night, he is attacked with symptoms of cholera morbus, and goes to the yard once, about 12 o'clock. On the next morning (Monday) he is still unwell, and complains of nausea and giddiness, but eats some breakfast in bed. He vomits at about 10 o'clock, A. M., and again about 4 or 5 o'clock, P. M.

"At 4 or 5 o'clock, P. M. of the same day, he is visited by a physician, who finds him very much nauseated, pale and prostrated, with a rapid and feeble pulse, sitting up, and holding a slop-bucket between his knees, into which he vomits frequently. A dose consisting of two drops of creosote, and a tablespoonful of lime-water, is given him, and ordered to be repeated every second hour, and it relieves him. He is seen again, at 2 o'clock, P. M., on Tuesday, sitting upon the side of his bed, examining his watch, but makes no remark.



dence in an inquiry as to the genuineness of a picture ; a ship-builder, after having heard the evidence of persons who have examined a ship, may give his opinion as to

“ He is visited by his physician again on Tuesday morning, about 10 o'clock, and is found asleep, but, on being aroused, expresses himself as well enough to leave Baltimore during the day. He continues to sleep during the morning, and when aroused and induced to walk from his bed to a lounge in the room, seems feeble and exhausted. He returns to his bed, and sleeps heavily, with heavy breathing, for several hours. He is again aroused, and returns to the lounge while his bed is being made up. In walking from the bed to the lounge, it is observed that he has difficulty in walking, that his gait is unsteady, and that he staggers as he moves along. He lies down on the lounge. No vomited matters are found in his room during the whole of that day, and he passes no urine. At 6 o'clock, P. M., he is discovered sleeping profoundly, and breathing stertorously, but afterwards, without waking, changes his position, and seems to breathe better. He spends the night on the lounge. His physician is sent for on Wednesday morning, and visits him about 10 o'clock, A. M., and finds him semi-comatose, with a feeble and rapid pulse ; pupils natural in size and insensible to light ; respiration slightly hurried, and the muscles of the neck, back, and extremities rigid ; he is aroused with difficulty, and immediately relapses into a profound sleep ; a tremor passes over him when touched ; he can only articulate a single word at a time, and is unable to frame a sentence ; he has passed no urine for more than twenty-four hours ; no special relaxation of such muscles as are not rigid, is observed ; his face is turned towards the back of the lounge, and is livid, of a purplish, bluish, and reddish tinge.

“ At 11 o'clock, A. M., forty drops of the tincture of yellow jessamine (*gelseminum*) are administered in two teaspoonfuls of water, his physician having previously removed him to his bed, and applied ice to his head ; his teeth are clenched ; his jaws are opened with difficulty to receive the medicine. In a short time his color improves, and his eyes look notably better, although he still remains unconscious and rigid. He then shows signs of great restlessness, struggles to get out of bed, and then relapses into a state of quiescence and semi-consciousness. At five minutes before 1 o'clock, another dose is administered, containing more liquid, between two and three

whether she was seaworthy; and where the question was, whether a bank which had been erected to prevent the overflowing of the sea, had caused the choking up

tablespoonfuls, as alleged, and in about 15 minutes afterwards, he slaps the shoulder of an attendant, grasps the back of his neck, seizes various parts of his body, scratches himself with his nails, utters disjointed words and cries, and then is seized with tetanic convulsions. Opistholonos is developed. At each convulsive movement there seemed to be a systematic effort to throw himself on his left side; he emits groans; trismus shows itself; coma increases, and the patient is apparently in articulo mortis. At about 1:30 o'clock, P. M., chloroform is administered, and at about 2 o'clock, P. M., 30 grains of chloral are given, and at about 3 o'clock, P. M., he dies, without abatement in his symptoms.

"His urine is drawn off about 1:30 o'clock, P. M., and tested with nitric acid and heat, without the discovery of any abnormal substance in it.

"The post-mortem examination reveals a rigor mortis, red marks like scratches on his neck and abdomen, some red patches in the mucous coat of the stomach and intestines, but no product of inflammatory action; the liver, spleen, esophagus, lungs, and heart in a healthy condition; the vessels of the dura mater were not very full of blood; the vessels of the pia mater somewhat congested; the veins filled with dark blood, indicating passive congestion; the brain substance natural and healthy, with some dark points of blood, indicating passive congestion on its cut surface, 'such,' in the language of his physician, 'as are frequently produced by the mere act of dying, and which may have been post-mortem'; no extravasation of blood; no increase or diminution of the cerebro-spinal fluid; no effusion of serum, and no signs or results of inflammation in any organ or structure; about two inches of the spinal cord, the medulla oblongata, were examined without the discovery of lesions. The rest of the spinal cord itself was not examined.

"From the symptoms as there described, and the post-mortem revelations there described, do you think the deceased died from natural or non-natural causes?

"Dr. Morris replied: It is a very difficult and delicate question; but if I were asked that naked question, and had no knowledge of surrounding things, I could not assign a cause of death; I see nothing to exclude the theory of death

of a harbor, the opinions of scientific engineers as to the effect of such an embankment upon the harbor, were held admissible evidence. (*m*) To these it may

(*m*) 1 Greenl. Ev. § 440, 7th Ed.

from a natural cause, but, at the same time, I can not venture to say what that natural cause was or might have been. Dr. Warren saw two cases of mine—one of an adult and one of a child; in truth, I invited the whole profession, as far as I could, to see my case, so anxious was I to investigate the nature of this new and insidious disease; it is at least new to us in Baltimore; two of my cases (of children) were suddenly taken, after returning from school, with the characteristic symptoms, which manifested themselves in forty-eight hours; then the fulmination terminated; one case was of a vigorous, stout man, and he still lives to tell the story."

It was held, however, in the subsequent trial of Mrs. Wharton for an attempt to poison Mr. Van Ness, that a hypothetical question thus put by one party, can not be objected to by the other, on the ground that it does not contain all the facts of the case,

But a witness can not be called to give an opinion on a mere probability. *People v. Rogers*, 13 Abb. N. S. 370; and see *Moorhouse v. Mathews*, 2 Comst. 514. A witness unskilled in the science or art touching which his opinion is asked, is incompetent to give an opinion. He can only state facts, and the jury must draw the conclusions. *Luning v. State*, 1 Chand. (Wis.) 178. But a question whether two pieces of wood were part of the same stick of natural growth is one for the testimony of experts. *Commonwealth v. Choate*, 105 Mass. 451. The testimony of experts, as experts, can not be received on subjects of general knowledge familiar to men in general, and with which jurors are presumed to be acquainted. *Concord Railroad v. Greeley*, 3 Fost. (N. H.) 237. But the opinion should be accompanied by the facts. *Crawford v. Andrews*, 6 Geo. 244; *Robertson v. Stark*, 15 N. H. 109. As a general rule, the opinion of witnesses is not to be received in evidence, merely because they may have had some experience or greater opportunities of observation than others, unless they relate to matters of skill and science. *Robertson v. Stark*, 15 N. H. 109; *Marshall v. Columbian Ins. Co.*, 7 Fost. (N. H.) 157; *Protection Ins. Co. v. Harmer*, 2 Ohio (Warden) 452; *People v. Godine*, 1 Denio, 281; *Smith v. Gugerty*, 4 Barb. 614; *Westlake v. St. Lawrence &c. Ins. Co.*, 14 Barb. 206; *Folkes v*

be added, that the opinions of antiquaries have been received relative to the date of ancient hand-writing (*n*) and where, on an indictment for uttering a forged instrument, the question was, whether a paper had originally contained certain pencil-marks, which were alleged to have been rubbed out and writing substituted in their stead; the opinion of an engraver,—who was in the habit of looking at minute lines on paper, and who had examined the document with a mirror,—as to such marks having existed, was held to be admissible,—but with the reservation, that the weight of the evidence would depend on the extent to which it might be confirmed. (*o*)<sup>1</sup> It is on this principle that

(*n*) Tracy Peerage case, 10 Cl. & F. 154.

(*o*) Per Parke, B., and Tindal, C. J., *R. v. Williams*, 8 C. & P. 434, 435.

Chudd, 3 Doug. 157; 1 Smith's Leading Cases, 630, 5th Am. Ed.; *Daniels v. Mosher*, 2 Mich. 183. But the expert's opinion must be based on all the evidence. If he has only heard a part, his testimony can not be received. *Luning v. State*, 1 Chand. (Wis.) 178; see *State v. Clark* 12 Ired. 151.

In *Morse v. Crawford*, 17 Vt. 499, it was held that a witness, not a professional man, may give his opinion in evidence in connection with the facts upon which it is founded, and as derived from them.

An expert may testify to general facts which are the results of general knowledge or scientific skill. *Emerson v. Lowell Gas Light Co.*, 6 Allen, 148.

<sup>1</sup> See *ante*, vol. 1, p. 438, note 1. The following additional authorities, as to proof of hand-writing, are valuable: A photographer, accustomed to examine hand-writing with a view to detect forgery, may give his opinion, based on photographic copies, made by himself, and introduced in evidence, and testified as accurate by himself. *Marcy v. Barnes*, 82 Mass. (16 Gray) 161; and see *Tyler v. Todd*, 36 Conn. 218; *Taylor Will Case*, 10 Abb. (N. Y.) Pr., N. S. 301. On a criminal trial, an expert in hand-writing may testify that, in his opinion, certain anonymous letters written in a disguised hand, are in the defendant's hand-writing; but he can not be asked whether the writing was executed with a peculiar instrument found in the defendant's possession. Com-

the evidence of professional or official persons is receivable as proof of foreign laws. (*ϕ*)<sup>1</sup> From the

(*ϕ*) *Tayl. Ev.* § 1280, 4th Ed.; *The B.* 208; *Bristow v. Sequeville*, 5 *Exch.* *Sussex Peerage case*, 11 *Cl. & F.* 85; 275; *Vander Donckt v. Thellusson*, 8 *Earl Nelson v. Lord Bridport*, 8 *Beav.* *C. B.* 812; *Perth Peerage case*, 2 *Ho.* 527; *The Baron de Bode's case*, 8 *Q. Lo. Cas.* 874.

*monwealth v. Webster*, 5 *Cush.* 295. Experts' opinions as to what is the date of a certain instrument, may be taken in evidence, where the figures expressing the date are obscure and difficult to be deciphered. *Stone v. Hubbard*, 7 *Cush.* 595. But as to the admissibility of expert opinions as to whether a signature is genuine or imitated, see *Furber v. Hilliard*, 2 *N. H.* 480. A person skilled in judging hand-writing is not therefore competent to give his opinion whether an erasure has or has not been made in an instrument. *Swan v. O'Fallon*, 7 *Miss.* 231. It is now well established that opinions as to the genuineness of hand-writing drawn from a comparison of hands, are not admissible in evidence. *Haskins v. Stuyvesant*, *Anthon.* 97; *Smith v. Walton*, 8 *Gill.* 77; *People v. Spooner*, 1 *Den.* 343. A witness must have drawn his knowledge either from having seen the person write, or from long familiarity with his hand-writing, and must swear to the correspondence of the signature with an exemplar existing in his own mind. *Kinney v. Flynn*, 2 *R. I.* 319; *McKonkly v. Gaylord*, 1 *Jones L. (N. C.)* 94; *Gordon v. Price*, 10 *Ired.* 385; *Reyburn v. Bellotti*, 10 *Miss.* 597; *McAllister v. McAllister*, 7 *B. Mon.* 269. *Little v. Beazly*, 2 *Ala.* 703, holds that signatures proved to be in the party's hand-writing, can not be given in evidence to the jury for the purpose of comparison, to prove genuineness. But it was held in *Commonwealth v. Williams*, that the testimony of one whose experience had been limited to the

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<sup>1</sup> See a determination as to the competency of a witness not a member of the French bar, to prove the law of France, in *Dauphin v. United States*, 6 *Ct. of Cl.* 221: A Spanish lawyer who had practiced in Cuba was permitted to testify "from a printed copy of the Spanish code of commerce as to the laws regulating special partnerships in Cuba. And see *Matter of Roberts' will*, 8 *Paige*, 446.

On the trial of an action on a judgment obtained in another state, testimony of experts from that state is admissible to show whether a service proved to have been made was sufficient to support the judgment. *Mowry v. Chase*, 100 *Mass.* 79.

very nature of the subject, experts can only speak to their judgment or belief.<sup>1</sup>

514. But the weight due to this, as well as to every

comparison of promissory notes, was admissible in a criminal trial as to whether two letters were written by the same hand, A witness who has never seen a person write before the controversy arose, can not be asked his opinion as to that person's hand-writing; *Pate v. People*, 3 Gilm. 644; or one who judges merely from the comparison in court; *Page v. Homans*, 2 Shepl. 478; *Wilson v. Kirkland*, 5 Hill, 682. In all cases the witness must first state his means\* of acquiring the knowledge of the hand-writing as to which he gives his opinion. *McCracken v. West*, 17 Ohio, 16. But see *Commonwealth v. Eastman*, 1 Cush. 189, which held that if hand-writing is to be proved by comparison, the standard used for the purpose must be a genuine and original writing, first established by undoubted proof; and that impressions of writings taken by means of a press, and duplicates made by a copying machine, can not be used as standards of comparison. And in *Robertson v. Miller*, 1 McMullan, 120, it was held that a comparison was admissible where there is conflicting testimony as to the genuineness of a signature, to enable a jury to decide as to the credibility of witnesses. It was said in *Rogers v.*

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<sup>1</sup> In *Paige v. Parker*, 40 N. H. 47, it is said that in order to entitle persons to testify as experts it must be first shown that they are possessed of superior actual skill or scientific knowledge upon the subject, and that a mere opportunity for observation is not sufficient. And see *Pelamourges v. Clark* 9 Iowa, 1. Courts will not go into the specialty of his experience, however. *Delaware, &c. Towboat Co. v. Starrs*, 69 Pa. St. 36. But in general, persons have been admitted to testify as experts upon showing that they have been educated in the peculiar art or profession. Opinions of unprofessionals are received ordinarily as to one's pecuniary standing. *Bank of Middlebury v. Rutland*, 33 N. H. 414. Or to the value of property. 1 *Nellis v. McCarn*, 35 Barb. 115; *McDonald v. Christie*, 42 Id. 36; *Derby v. Gallup*, 5 Min. 119. But see as to rule otherwise in New Hampshire, *Low v. C. & P. R. Ry. Co.*; *Brady v. Brady*, 8 Allen, 101. Testimony of experts is not admissible as to matters of judgment within the experience or knowledge of ordinary jurymen. *New England Glass Co. v. Lovell*, 7 Cush. 321; *White v. Ballou*, 8 Allen, 408.

other kind of evidence, is to be determined by the tribunal; which should form its own judgment on the matters before it, and is not concluded by that of any

Ritter, 12 Wall. 317, that when the court, on preliminary examination of a witness, can see that he has, in any way, acquired knowledge which will enable him to judge as to the genuineness of hand-writing, he should be permitted to give his opinion to the jury. A paper proved or admitted to be genuine, is not admissible in evidence merely for the purpose of showing the genuineness of another paper by a comparison of hands. And in an indictment for forgery, the mere fact that a genuine paper is copied in the indictment, without any allegation respecting it, does not render it admissible for that purpose. *State v. Givens*, 5 Ala. 747.

But to prove the hand-writing of a person who had been dead upwards of forty years, witnesses may speak from a comparison of such hand-writing with signatures and writings in family records, which are admitted to be genuine, or with letters in the possession of his family, purporting to be signed by him, or with official documents which have been received

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So it has been held that mere opinions as to an amount of damage sustained will not be received. *Harger v. Edmonds*, 4 Barb. 256; *Giles v. O'Toole*, Id., 261; *Walker v. Protection Ins. Co.*, 16 Shepl. 317. Or mere opinions as to the value of property in common use, such as horses, wagons, or lands, concerning which no particular study is required. *Robertson v. Stark*, 15 N. H. 109; *Mish v. Wood*, 34 Penn. 451; *Boston, &c. R. R. Co. v. Old Colony R. R. Co.*, 3 Allen, 142; *Dole v. Johnson*, 50 N. H. 452; *Rochester v. Chester*, 3 N. H. 349; *Peterborough v. Jaffrey*, 6 Id. 482; *Whipple v. Walpole*, 10 Id. 130. But the rule is not undoubted. See *Shaw v. Charlestown*, 2 Gray, 107; *Vandine v. Burfee*, 6 Met. (Mass.) 288. But the opinion of an expert based on general observations of sales, &c., is admissible as to the marketable value of a dog. *Cantling v. Hannibal, &c. R. R. Co.*, 54 Mo. 385. And as to the value of lumber, the proximity of the locality where the witness attained his experience will be considered. *Lawton v. Chase*, 108 Mass. 238; *Dole v. Johnson*, 50 N. H. 452; see *Greeley v. Stilson*, 27 Mich. 153. Farmers and dairymen are competent witnesses as experts in an action to recover damages for the adulteration of milk. *Lane v. Wilcox*, 55 Barb. 615. In an action for communicating the foot-rot to

witness, however highly qualified or respectable. Nor is this always an easy task ; there being no evidence the value of which varies so immensely as that now under and acted upon as genuine in the proper offices. *Swergait v. Richards*, 8 Barr. 436. It was held in *Woodford v. McClenahan*, 4 Gilm. 85, and in *Edelen v. Gough*, 8 Gill, 89, that one who has seen a person write but once is competent to prove his hand-writing. And see also *Pepper v. Barnett*, 22 Gratt. 405. But one who has received letters purporting to be from a certain person, and who has answered them, but received no reply, is not a competent witness as to that person's hand-writing. *Webb v. Mauro*, 1 Morris, (Iowa) 329. And the papers admitted to prove genuineness, may be sent to the jury. *Robertson v. Miller*, 1 M'Mullen, 120.

The testimony of experts is admitted in corroboration of positive evidence to prove that, in their opinion, the whole of an instrument was written by the same hand, with the same pen and ink, and at the same time ; *Fulton v. Hood*, 34 Penn. 365 ; or to aid the court in reading an instrument. *Greenleaf on Evidence*, 1, § 280. If a question arises from the obscurity of the writing itself, it is to be determined by the court alone. *Id.* citing a *nisi prius* decision said to have been made by

sheep, the editor of a stock journal who had read extensively on the subject was admitted to testify as an expert. *Dole v. Johnson*, 50 N. H. 452. In an action for damages caused by the falling of an upper berth upon plaintiff upon defendant's steamboat, one testifying to long and thorough acquaintance with the construction of berths on steamboats is admissible as an expert. *Tinney v. New Jersey Steamboat Co.*, 1 Abb. Pr., N. S. 1. Practicing lawyers are experts as to the value of an attorney's services. *Allis v. Day*, 14 Minn. 516 ; and see *Smith v. Kobbe*, 59 Barb. 289. A carpenter of twenty-five years' experience is an expert, and may testify as to damage caused by defective construction of a cellar under a house he was employed in building. *Moulton v. McOwen*, 103 Mass. 587. Whether a person appeared as if intoxicated may be shown by the opinion of an ordinary witness. *People v. Eastwood*, 14 N. Y. 562.

The rule determining the subjects upon which experts may testify, as well as the rules as to their qualifications, are matters of law ; but as to whether a witness offered as an expert has those qualifications, is a question of fact. *Jones v. Tucker*, 41 N. H. 546. So if the grounds of his knowledge seem to be slight,



consideration, and respecting which it is so difficult to lay down any rules beforehand. Its most legitimate, valuable, and wonderful application is on charges of

Lord Denman, *Reymen v. Haywood*, 2 Adol. & Ellis, 666, note. But see Jackson *ex dem.* Swain v. Ransom, where a lot of land was described in a deed by a number expressed in figures, which the plaintiff read 174 and the defendant 84, and where upon an examination of the whole deed, the jury and court were both satisfied that it was 174, it was held a sufficiently certain description. This point arose and was held, contrary to Dr. Greenleaf's rule, in an English case in the common pleas, not cited by the author. *Armstrong v. Burrows*, 6 Watts R. 266. There the parties differed about the date of a receipt which had become illegible, one reading it 1823 and the other 1824. The court assumed the exclusive right of determining what the figures were, and refused to put the case to the jury. On this ground error was brought to the supreme court, where the judgment of the common pleas was reversed. Gibson, Ch. J., delivering the opinion of the supreme court, said: "A writing is read before it is expounded, and the ascertainment of the words is finished before the business of exposition begins. If the reading of a judge were not matter of fact, witnesses would not be heard in contradiction of it; and though he is supposed to have peculiar skill in the

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and derived from hearsay; *Clark v. Bigelow*, 4 Shepley, 246; *Nute v. Nute*, 41 N. H. 60; he will be rejected; but see *Dunham's appeal*, 27 Conn. 193. But experience or observation may be competent. So, in an action for breach of promise to marry, a person accustomed to observe the mutual deportment of the parties, may give his opinion as to whether they were attached to each other. *McKee v. Nelson*, 4 Cow. 355. But upon the question as to whether certain implements were part of the necessary tools of a person's trade, the opinions of witnesses are not admissible, but it is for the jury to determine upon the facts proved. *Whitmarsh v. Angle*, 3 Am. Law Journ. 274. A secretary of a fire insurance company may testify as to the probable increase of risk to a dwelling-house, by the proximity of a railway; but see *Joyce v. Maine Ins. Co.*, 45 Me. 168; *Webber v. Eastern R. R. Co.*, 2 Met. 147; or one for a long time acquainted with a certain stream, may testify as to the sufficiency of a dam to resist its force in times of freshet; *Porter v. Poquonnoc Mfg. Co.*, 17 Conn. 249. A practi-

poisoning, where poison is extracted from a corpse by means of chemical analysis. (q) "It is surely," says Dr. Beck, (r) "no mean effort of human skill, to be

(q) *Supra*, ch. 2, sect. 3, subs-ect. 2.

(r) Beck's Med. Jur. 1085, 7th Ed.

meaning and construction of language, neither his business nor learning is supposed to give him a superior knowledge of figures or letters. His right to interpret a paper written in Coptic characters, would be the same that it is to interpret an English writing; yet the words would be approached only through a translation. The jury were therefore not only legally competent to read the disputed word, but bound to ascertain what it was meant to represent. And see the English cases of *Masters v. Masters*, 1 P. Williams, 421, 425; *Norman v. Morrell*, 4 Vest. 769, 770; *Goblet v. Beechey*, 3 Sim. 24; *Wigram on Extr. Ev.*, 185, 3d ed. In *Cowen & Hill's* notes to *Phillips on Evidence*, 419, it is said that where a writing is illegible from lapse of time, accident, &c., one skilled in deciphering—as, *e. g.*, a clerk in a post office—may be called. And see *Sheldon v. Benham*, 4 Hill, 129.

cal surveyor may testify as to whether certain marks on piles of stone, &c., were meant for monuments or marks of boundary. *Davis v. Mason*, 4 Pick. 156. It is said that he can not be asked whether, in his opinion, a tract surveyed by him is identical with a tract marked on a chart or diagram (1 *Greenleaf on Evidence*, 440); but it was held in *Merser v. Reginniliter*, 32 Iowa, 312, that he may give in evidence his opinion as to the correctness of a plat.

Witnesses are not admissible to state their opinions as to matters of legal or moral obligation, or as to the manner in which others than himself would probably be influenced, if parties acted in one way rather than in another (*Greenleaf on Evidence*, 1, § 441). A witness, *e. g.*, can not be asked what would have been his own conduct in a particular case (*Id.*); *Joyce v. Maine Ins. Co.*, 45 Me. 168; or whether a physician had performed his duty skillfully (*Greenleaf on Evidence*, 1, § 441); but in an action for assault with intent to kill, evidence of experts as to the location, character, and probable consequences of the wound inflicted is proper as bearing upon the intent of the defendant. *People v. Kerrains*, 1 *Thomp. & C.* (N. Y.) 333. But the general rule as to expert testimony admits of many modifications, under peculiar circumstances arising in every case, and the student of this branch of evidence will do well to observe them all.

brought to a dead body, disinterred perhaps after it has lain for months, or even years in the grave ; to examine its morbid condition ; to analyze the fluids contained in it (often in the smallest possible quantities) ; and from a course of deductions founded in the strictest logic to pronounce an opinion, which combined circumstances, or the confession of the criminal, prove to be correct.” “ It is such duties, ably performed, that raise our profession to an exalted rank in the eyes of the world ; that cause the vulgar, who are ever ready to exclaim against the inutility of medicine, to marvel at the mysterious power by which an atom of arsenic, mingled amidst a mass of confused ingesta, can still be detected.<sup>1</sup> It does

“ A most interesting and valuable case, turning substantially upon the testimony of experts, as to their search for poison in the stomach of a deceased person, is presented by the two trials of Mrs. Elizabeth G. Wharton, on the separate charges of murder, by poisoning, General W. S. Ketchum by administering tartar emetic (tried at Annapolis, Maryland, December 2nd, 1871, to January 24th, 1872), and of attempting to murder Mr. Eugene Van Ness (tried at Annapolis, January 6th, 1873). The lady charged with these crimes was supposed to be quite wealthy, of highly respectable antecedents, the widow of Major Wharton of the army. On the evening of June 24th, 1871, General Ketchum, a friend of Major Wharton, arrived at Mrs. Wharton's residence in Baltimore, intending to remain a few days. On the same night he was taken ill, and died on the 28th. During his illness he was attended by Dr P. C. Williams. On the afternoon of the 24th, before Ketchum's arrival, Mr. Eugene Van Ness, an intimate friend of the Wharton family, had called to pay a visit on his way home from his business. Shortly after his arrival, Mrs. Wharton offered him a glass of beer, which she said contained drops of gentian (a strong tonic), and her hospitality was accepted. In a short time Mr Van Ness became very sick, and had to remain in her house. His family were notified, and Dr Chew was summoned to attend him ; and he remained ill in the house until after Ketchum's funeral. As the sudden death of General Ketchum had excited remark, the sickness of Mr Van Ness, and other circumstances, gave rise

more : it impresses on the minds of assassins who resort to poison, a salutary dread of the great impossibility of escaping discovery." And this, if properly done, must

to a suspicion of crime on the part of Mrs. Wharton. The remains of General Ketchum had been removed to Washington, and there a post mortem examination was made. Prof. William E. A. Aiken of the Maryland University was engaged to analyze the contents of General Ketchum's stomach, and reported the presence therein of twenty grains of tartar emetic; upon this evidence a warrant was issued, and Mrs. Wharton (who had been making preparations to leave Baltimore for Europe, July 10th), was taken into custody. The defense to the indictment for murder, relied on by the prisoner, was that of death from natural causes; and both sides relied upon the testimony of distinguished experts, twenty-seven of whom were in all examined. According to the practice of the Maryland courts in criminal cases, the judge did not charge the jury. The only accessible report of that trial before us is a pamphlet published by the "Baltimore Gazette" newspaper, containing its reports as printed from day to day, from which we extract a few of the more important rulings:

By MILLER, Ch. J.—That an expert may give his opinion in evidence when founded either upon his observation or reading (p. 22). That the opinion of experts may be tested by a cross-examining counsel, by reading from medical works (24, 57, 58, 80, 93, 107, 111, 127), that a question whether a person might not die from poisoning, and the poison not be detected in the stomach, should be asked of a medical and not a chemical expert (p. 28). That upon a trial for causing death by poisoning, evidence of an alleged attempt about that time by the prisoner to poison another person, can not be given, that being a separate and distinct offense (p. 41). That in such trials it was competent to show that tartar emetic (a poison) had been found in the defendant's house, and this could be testified to by persons who had tasted it; and evidence was admissible of the symptoms of those affected by it. Where an expert as a witness has been examined up to a certain point, and is at the time engaged in making an analysis of portions of the remains of the corpus delicti, which he announces he can complete in two days—and where the question before the court is whether or not the scientific investigation can go on, the Court said: "The case is an extraordinary one, and the indictment charges a most heinous crime. A chemist who

be accomplished without listening to rumor and without permitting prejudice to operate. Many, again, by their researches, have saved the innocent, showing that

has analyzed a portion of the body of the deceased has been examined, and another analysis has been diligently pursued since the second exhumation of the body of the deceased. The witness has sworn that he has discovered the presence of poison, and that a delay of a day or two will enable him to determine fully whether it is antimony or arsenic. The court considers it to be its duty to allow that time. The state may go on, and if necessary, the court will take an adjournment to let the witness come back and testify to what he discovers. If a similar case was presented by the defense, the court would allow them time to make experiments. If in a civil suit it was necessary for a person to send for a paper to establish his title to property, the court think it would be monstrous not to allow him reasonable time in which to obtain it." The court gave the State's Officers notice that if they did not recall the witness for further examination, they must have him in court for cross-examination by the defense. And see ruling of MILLER, J. (*Id.* p. 141), allowing an expert, recalled for the state in rebuttal, to exhibit the results of certain experiments he had made while the trial was in progress.

An expert can not give his opinion as to the conscientiousness of another expert's experiments; he can only give his opinion as to their value, scientific results (pp. 78, 82-87, 119). But see, as to this, p. 84, where portions of a previous expert's testimony were read to one subsequently sworn. And see extracts from testimony (p. 103-119). An extended hypothetical case, describing symptoms, doses, hours, operations, &c., may be read to an expert for his opinion (p. 108). And an expert may give his inferences drawn from the case on trial as thus presented to him, or from the testimony itself, if he has heard it all. An interesting question as to whether a number of a medical periodical (in this case "The London Medical Gazette"), was entitled to be considered a medical treatise and read from on the trial, was raised by counsel for the defense, but the reading does not appear to have been insisted on, or ruled upon by the court.

That in a trial for murder, where the defense interposed is one of death from natural causes, after such a defense had been *prima facie* established by the expert testimony, the prosecution might bring evidence in rebuttal of such evi-

accidental or natural causes have produced all the phenomena." It would not be easy to overrate the value of the evidence given in many difficult and delicate dence, so far as related to the hypothetical statement of symptoms (p. 108), but the question of death by poison was closed.

That—(HAYDEN, J., dissenting)—on rebuttal an expert could not exhibit an antimonial compound to the jury. He could swear to the results from the two precipitates in question. Judge HAYDEN said it was his opinion that the two experiments (with and without antimony) could be shown the jury, and they allowed to judge.

The defense appear to have established that the symptoms exhibited by General Ketchum before his death, were those of cerebro-spinal meningitis, and the jury returned a verdict of "not guilty."

Of Mrs. Wharton's second trial for the attempt to poison, we have only been able to examine the reports of the "Baltimore American and Gazette," of January 6th, 1873, and succeeding days. As in the previous case, a large number of experts were examined. The jury failed to agree and were discharged. The following are some of the more important rulings by MILLER, J.: A witness for the prosecution (in this case the person whose life the accused was alleged to have attempted), can not testify to his suspicions. That a question as to the authority of text-books quoted in the progress of the trial, does not arise until there is a conflict of statement or opinion between the text-books and the testimony of an expert. But (in another place), the opinions of medical experts can not be contrasted with the opinions of text-writers, by asking whether the witness agrees with what the book says: An expert can not submit his opinion as to the prisoner's guilt to the jury. He can not judge as to the truth or falsity of the statements made to him upon which to found an opinion. It is proper to ask a medical expert such a question as, "Can you, as a medical man, account for the symptoms of Mr. Van Ness, as observed by you on Monday night or Tuesday morning, based upon your actual observations, and from what you heard from the patient himself, as to what he had taken, and how he was affected and had suffered up to the time you saw him, as you have detailed in your testimony to the jury, assuming the statements made by Mr. Van Ness, and as detailed by you, to be true?" An expert can not testify as to a conflict of opinion between himself and another expert.

It is admissible to cross-examine an expert as to what

inquiries, not only by medical men and physiologists, but by learned and experienced persons in various branches of science, art, and trade. But as it is impossible for him to read upon the subjects included in his direct examination. It is improper to ask a medical expert if it is not his duty to preserve matter vomited up by a patient, for the purpose of analyzing it. An expert can not be asked if he has not made experiments which were not approved of by the world of science. An expert can not be allowed to express an opinion as to what a previous expert should have done in the way of experiment called for by the trial. A chemical expert, who is produced to testify to a certain experiment performed by him as to matters in examination in the trial, can not be permitted to produce and exhibit to the jury various phials containing various solutions and precipitates used or obtained in the course of those experiments.

In the words of the newspaper report: "To thoroughly demonstrate the tests that he had used and their results, Prof. Tonry had with him a great number of little bottles, packages, microscopic matters, and other things. To illustrate his evidence he exhibited two or three of these little phials containing solutions, but before he could go further, the defense made objection, and the court sustaining it, ruled that no substances could be shown to the jury, although the processes by which they were obtained might be minutely described. This, it was said, was the law.

"As a matter of interest, the readers of 'The American' may wish to know what things they were that Professor Tonry was not allowed to show to the jury. They were as follows:

"1st. Milk punch made with whiskey.

"2nd. Milk punch with sulphuretted hydrogen passed through it.

"3rd. Milk punch with tartar emetic and with sulphuretted hydrogen passed through it.

"4th. Orange red precipitate taken from the milk punch No. 3.

"5th. Part of sediment of tartar emetic which remained undissolved. This was to show that though tartar emetic will not dissolve in pure alcohol, a part of it will do so in the diluted form of milk punch. Professor Tonry estimated the proportion that would dissolve.

"6th. Same as No. 5, after treatment as Dr. Aiken treated it, except in muriatic acid. It gave all the results of Dr. Aiken's tests.

sible to measure a priori the integrity of any witness and equally so to determine the amount of skill which a person following a particular science, art, or trade may possess, the tribunal is under the necessity of listening to all such persons when they present themselves as witnesses. Now, after making every allowance for the

"7th. Milk punch made with brandy—sugar sediment. 8th. Milk punch with sediment dissolved in water. 9th. Milk punch acidified with tartaric acid and treated with sulphuretted hydrogen. 10th. Antimony obtained from General Ketchum's liver and crystalized as tartar emetic. 11th. Metallic antimony. 12th. Metallic antimony converted into orange red precipitate. 13th. White incrustations of antimony given in charcoal. 14th. Metallic antimony from Marsh's test. 15th. Metallic antimony converted into orange red precipitate. 16th. White precipitate made by antimony when dropped into water.

"In addition to these he had a variety of things with which it is understood he proposed to demonstrate that Professor McCullough and his coadjutors either made great mistakes or willfully practiced a fraud on the court by claiming, as experts, that treated in exactly the same way as antimony, both chloral and gelseminum would give the same results as antimony. The court ruled that none of these bottles, and other illustrations and demonstrations could go before the jury."—"Baltimore American," January 23, 1873. The court overruled the state's offer to introduce evidence to prove that while Van Ness was ill at Mrs. Wharton's, General Ketchum had arrived there, on a visit, in good health; that he had there sickened and died, and that a poisonous drug was found in his viscera, and ruled that the defense could not bring the authority of scientific works to corroborate on cross-examination the testimony of experts. That an expert witness can not be allowed to state the manner in which he would have conducted the analysis; and that the defense can not be allowed to ask an expert whether the approved chemical authorities do not declare that the reduction of the metal in its metallic form is the proper evidence of the existence of the substance in the article analyzed. An expert can not be asked what a certain text-book says upon a certain subject, but the book itself must be produced.



natural bias which witnesses usually feel in favor of causes in which they are engaged, and giving a wide latitude for bona fide opinions, however unfounded or fantastical, which persons may form on subjects necessarily depending much on conjecture, there can be no doubt that testimony is daily received in our courts as "scientific evidence," to which it is almost profanation to apply the term, as being revolting to common sense, and inconsistent with the commonest honesty on the part of those by whom it is given. In truth, witnesses of this description are apt to presume largely on the ignorance of their hearers with respect to the subject of examination, and little dread prosecution for perjury—an offense of which it is extremely difficult, indeed almost impossible, to convict a person who only swears to his belief, particularly when that belief relates to scientific matters. (s) On the other hand, however, mistakes have occasionally arisen from not attaching sufficient weight to scientific testimony. This arises chiefly where the knowledge of the tribunal and society in general, are very much in arrear of the scientific knowledge of the witness. One remarkable instance is cited by a modern author on the law of evidence. In the infancy of traveling by steam on land, a civil engineer of high reputation having deposed before a Parliamentary committee, that steam-carriages might very possibly be expected to travel on railroads at the rate of ten miles an hour, the interrogating counsel contemptuously bid him stand down, for he should ask

(s) Bonnier, in his *Traité des Preuves*, after quoting the 64th Novel, which abundantly shows that these malpractices were well understood in ancient Rome, sarcastically adds, "On voit que les complaisances de l'expertise ne datent pas de nos jours." § 68.

He likewise forcibly observes, § 67, "L'expertise n'est qu'un verre qui grossit les objets; et c'est au juge, qui a la faculté de s'en servir, à examiner en toute liberté si les images qu'elle lui présente sont bien nettes."

him no more questions, and the weight of the evidence he had previously given was much impaired. (t) <sup>1</sup>

515. In France experts are officially delegated by the court to inquire into facts, and report upon them; and they stand on much higher footing than either ordinary or scientific witnesses among us. Yet even there it is a maxim, "*Dictum expertorum nunquam transit in rem judicatam.*" (u) But our law, in its desire to vindicate the unquestionably sound principle, that judicial and inquisitorial functions ought to be kept distinct, appears not to have armed the courts with sufficient power to compel the production of evidence. For although the power of the courts to procure the evidence of experts, has been greatly enlarged by recent enactments, (v) still it would seem, that those enactments do not authorize the exercise of that power, *ex officio*, but only on the application of a party to the action. (w)

(t) *Gresley, Ev. in Eq.* 369. Stephenson's evidence, before the committee on the Liverpool and Manchester Railway Bill, was received with equal incredulity. See Smiles' *Life of Stephenson, in loc.*

(u) *Bonnier, Traité des Preuves*, § 74.

(v) See 17 & 18 Vict. c. 125, s. 58; 36 & 37 Vict. c. 66, Sched. Rule 45, *supra*, § 197.

(w) Power to proceed *ex officio* in certain cases, has been given to the

courts by the 22 & 23 Vict. c. 63, and 24 Vict. c. 11; by the former of which, the courts in one part of the Queen's dominions, are empowered to remit a case for the opinion of a court of justice in any other part thereof, on any point on which the law of that other part is different from that in which the court is situate; and by the latter, to remit a case, with queries, to the tribunals of foreign countries, for the purpose of ascertaining the law of those countries.

<sup>1</sup> "Medical science, said Dr. Donaldson, a witness in the first Wharton trial, "is progressive, and we have no security that all the theories now in vogue will not be upset in thirty years." (Pamphlet, p. 58). See as to experiments made in the presence of the jury, *Id.* p. 39. A question, "Is chemistry a progressive science, a science that is still being improved," was held not admissible on Mrs. Wharton's second trial. Report of proceedings, Jan. 22, 1873, in "Baltimore American."

516. So far as medical evidence is concerned, medical jurists complain that there is too little discrimination exercised, in receiving all who are called doctors as witnesses. "In England," says an able authority already quoted, (*x*) "not only physicians, surgeons, apothecaries, beyond whom it should not be extended, but hospital dressers, students, and quacks, have been permitted to act as medical witnesses. 'We could point out a case of poisoning,' say the editors of the *Edinburgh Medical and Surgical Journal*, 'where the most essential part of the evidence depended on the testimony of a quack alone, and it was admitted.'" But, to answer these authors in their own language, the remedy they prescribe is worse than the disease. Must the judge, before receiving the testimony of a man who makes profession of the healing art, institute a preliminary inquiry as to whether he comes within the definition of a "quack?"—one of the most uncertain words in the language, and the correctness of the application of which to particular individuals must ever, to a certain extent, be matter of opinion. Besides, it would be at variance with the free spirit of our laws, to place the lives and liberties of all persons accused of offenses, in the hands of a privileged class, by prohibiting them from availing themselves of the testimony of others who have studied and practiced the subject in question. Still it must be conceded that our practice is much too loose in this respect—that when medical, or other scientific witnesses are offered, our judges and jurymen do not inquire sufficiently into the *causa scientiæ*,—the means which they have had of forming a judgment. To say nothing of those palpable cases where the course of study has been so short, or the experience so limited, that

(*x*) Beck's Med. Jurisp. 1091, 7th Ed.

♦

the judge ought to reject the witness altogether ; or of those where, though the evidence must be received, it is clear that little confidence ought to be reposed in the opinion given,—it often happens that even men distinguished in one branch of a science or profession, have but a superficial knowledge of its other branches. The most able physician or surgeon may know comparatively little of the mode of detecting poisons, or of other intricate branches of medical jurisprudence ; so that a chemist or physiologist, immeasurably his inferior in every other respect, might prove a much more valuable witness in a case where that sort of knowledge is required. (y) <sup>1</sup>

(y) The celebrated John Hunter, of Donellan, indicted for having poisoned his brother-in-law, used to be examined as a witness in the important case to express his regret publicly in his lec-

<sup>1</sup> As to opinions of medical men, and the modes of their examination, see *Erickson v. Smith*, 2 Abb. N. Y. App. Dec. 64 ; *State v. Morphy*, 33 Iowa, 270 ; *Tome v. Parkersburg R. R. Co.*, 39 Md. 36 ; *State v. Wood*, 53 N. H. 484 ; *Tingley v. Cowgill*, 48 Mo. 291 ; *State v. Porter*, 34 Iowa, 131. A physician examined as an expert, who has described the nature of a wound, may be asked whether it could have been produced by one blow of a club with which the prisoner was proved to have struck the deceased ; but he can not be asked if the wound might have not been caused by a stone, where it is not proved that any stone was used to strike with, which is a mere probability. *People v. Rogers*, 13 Abb. Pr., N. S. 370. But an expert may testify, in the case of wounds found upon the person of deceased, found in a sink, as to whether they might have been caused by his falling into the sink. *Davis v. State*, 38 Md. 15, 43. On a trial for murder, the opinions of a medical man as to the cause of death, are competent evidence. *Shelton v. State*, 34 Tex. 662. A physician may be asked to give his opinion as to the cause of a spinal difficulty with which he has testified that a person was afflicted ; but in such case he must state the facts upon which his opinion is founded. *Matteson v. New York, &c. R. R. Co.*, 62 Barb. 364. Medical men, when called as scientific witnesses, can not give their opinions as to the merits of a cause, but their opinions must

**517.** 2. Another class of exceptions is to be found, where the judgment or opinion of a witness, on some question material to be considered by the tribunal, is formed on complex facts which from their nature it would be impossible to bring before it. Thus, the identification by a witness of a person or thing is necessarily an exercise of his judgment. "In the identification of person," says Parke, B., (2) "you compare in your mind the man you have seen, with the man you see at the trial. The same rule belongs to every species of identification." And on the same occasion Alderson, B., said: "Generally, where there is such a coincidence in admitted facts, as makes it more reasonable to conclude that a certain subject-matter is one thing rather than another, that coincidence may be laid before the jury, to guide their judgment in deciding on the probability of that fact." Many mis-

tures, that he had not given more attention to the subject of poisons, before venturing to give an opinion in a court of justice. Sir Astley Cooper,

as quoted in Beck's Med. Jur. 1089, 7th Ed.

(2) Fryer v. Gathercole, 13 Jur. 542.

be predicated upon the facts proved; where, however, the facts are doubtful, they may be asked their opinion upon a case hypothetically stated. *Tingley v. Cowgill*, 48 Mo. 291. *Ante*, note p. 870. Whether a child was a "full-time child" may be testified to by any physician, of ordinary experience, who attended at the birth. *Young v. Makepeace*, 103 Mass. 50. As to what extent of knowledge will qualify a physician, who is not a veterinary surgeon, to testify as an expert concerning a diseased mule, see *Horton v. Green*, 64 N. C. 64. As to experts on diseases of animals, see remarks in *Slater v. Wilcox*, 57 Barb. 604. As to what degree of knowledge of the special subject of insanity is necessary, see *Davis v. State*, 35 Ind. 496; *Call v. Byram*, 39 Id. 499. As to opinions and examinations of experts in cases of malpractice, see *Dexter v. Hall*, 15 Wall. 9; *Bishop v. Spining*, 38 Ind. 143. It has been said that a physician may be competent to testify as an expert on questions of insanity, although he has not made diseases of the mind his special study. *State v. Reddick*, 7 Kans. 143.

takes, however, have been made in the identification both of persons and of things. (*a*) So, the state of an unproducible portion of real evidence—as, for instance, the appearance of a building, or of a public document which the law will not allow to be brought from its repository—may be explained by a term expressing a complex idea, *e. g.*, that it looked old, decayed, or fresh, was in good or bad condition, (*b*) &c. So also may the emotions or feelings of a party whose psychological condition is in question—thus a witness may state whether, on a certain occasion, he looked pleased, excited, confused, agitated, frightened, or the like. (*c*) To this head also belong the proof of handwriting, *ex visu scriptionis* and *ex scriptis olim visis*. (*d*)<sup>1</sup> And it is on this principle that testimony to character is received; as where a witness deposes to the good or

(*a*) The resemblance between individuals is often very close. A well-known man of fashion once narrowly escaped conviction for a highway robbery, from his extraordinary resemblance to a notorious highwayman of the day (Beck's Med. Jur. 408, 7th Ed.); and Sir Thomas Davenport, an eminent barrister, swore positively to the persons of two men, whom he charged with robbing him and his lady in the open daylight. A clear alibi was however proved, and the real robbers being afterwards taken into custody, with the stolen property upon them, Sir Thomas, on seeing them, at once acknowledged that he had been mistaken (*per MacNally, arguendo*, in *R. v. Byrne*, 28 Ho. St. Tr. 819). For other cases of mistaken identity of persons, see Wills, Circ. Evid. 90 *et seq.* 3rd Ed.; Beck's Med. Jurisp. 404

*et seq.* 7th Ed.; the case of James Crow, Theor. of Pres. Proof, Append. Case 4, and that of Male, 3 Benth. Jud. Ev. 255, and Dicks, Law Ev. in Scotl. 153, note (*d*), and 154 (*a*). In *Shufflebottom v. Allday*, Exch. M. 1856, MS., Alderson, B., mentioned a case which occurred at Liverpool some years before, where a prisoner was identified by six or seven respectable witnesses; but their evidence was encountered by that of the jailer and all the officers of the prison, who deposed that at the time in question he was there in their custody. A good instance of mistaken identity of things, taken from Burnett's Crim. Law of Scotland, p. 558, will be found in 19 Ho. St. Tr. 494 (note).

(*b*) *Leighton v. Leighton*, 1 Str. 240.

(*c*) *Supra*, ch. 2, sect. 3, sub-sect. 3.

(*d*) Bk. 2, pt. 3, ch. 2.

<sup>1</sup> See *ante*, p. 874, note 1.

bad character of a party who is being tried on a criminal charge, or states his conviction that, from the general character of another witness, he ought not to be believed on his oath. (e)<sup>1</sup> In all cases, of course, the grounds on which the judgment of the witness is formed, may be inquired into on cross-examination.

(e) *Supra*, pt. I, ch. I.

<sup>1</sup> So evidence of intention. Evidence of intention is only proper when the intention itself is part of the issue in controversy. *Courtland v. Patterson*, 9 Fost. 280, and see *Cole v. Whitely*, 3 G. & J. 197; *Patton v. Ferguson*, 18 N. H. 528; *People v. Williams*, 8 Park. Cr. R. 88, 107; *State v. Duler, Phillips*, (N. C.) L. R. 211; but see 1 *Greenleaf on Evidence*, § 98; *Lund v. Tinebro*, 9 Cush. 376; *Whiteford v. Burkmeier*, 1 Gill. 140; *Crawford v. Beal*, 21 Md. 233. In the *Wharton* trial Judge Miller held that the following question on a trial for murder was improper: "From your knowledge of Mrs. Wharton's (the accused) general reputation as to the qualities of humanity, kindness, and amiability, as you have testified to, would you, or would you not, believe her capable of committing the crime of murder?" In the second trial of Mrs. Wharton, for an attempt to take the life, by poison, of Mr. Van Ness, the court (Miller, Ch. J.) ruled that the person whose life was alleged to have been attempted, could not, as a witness for the prosecution, swear to his own suspicions; and, in another place, although a witness might testify as to what that person had said about the state of his health at a certain time, she could not testify as to his entertaining fears as to his health in the future.

## CHAPTER VII.

## SELF-REGARDING EVIDENCE.

## SECTION I.

## SELF-REGARDING EVIDENCE IN GENERAL.

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**518.** In the preceding chapters, we have shown the general nature of those rules by which evidence is rejected for want either of originality or of proximity. The present will be devoted to that species of evidence for or against a party, which is afforded by the language or demeanor of himself, or of those whom he represents, or of those who represent him. All such evidence we purpose to designate by the expression "Self-regarding." When in favor of the party supplying it, the evidence may be said to be "Self-serving;" when otherwise, "Self-disserving." (*a*)

**519.** The rule of law with respect to self-regarding evidence is, that when in the self-serving form it is not in general receivable; but that in the self-disserving form it is, with few exceptions, receivable, and is usually considered proof of a very satisfactory kind. (*b*) For, although, when viewed independently of jurisprudence, it would be difficult to maintain that the declarations, or what is equivalent to the declarations of one man, may not in particular cases have some probative force as evidence against another,—still our law rejects them (*c*) in obedience to its great principle, which requires judicial evidence to be proximate; and also from the peculiar temptations to fraud and fabrication, which the allowing such evidence would so obviously supply. This is a branch of the general rule, that a man shall not be allowed to make evidence for himself. (*d*) But, on the other hand, the universal experience of mankind testifies that,—as men

(*a*) These three terms are taken from Benth. Jud. Ev. vol. 5, p. 204. The term "Self-regarding" and its two species are also applicable to the statements and demeanor of witnesses.

(*b*) Gilb. Evid, 119, 4th Ed.; Finch, Law, 37; Trials per Pais, 381. See

acc. Mascard. de Prob. Quæst. 7, n. 10.

(*c*) 2 Campb. 389, and *supra*, bk. 1, pt. 1, § 91.

(*d*) 3 B. & A. 144. See *supra*, ch. 5, § 506.

consult their own interest, and seek their own advantage—whatever they say or admit against their interest or advantage may, with tolerable safety, be taken to be true as against them, at least until the contrary appears.

520. The subject of self-serving evidence may therefore be despatched in few words, and indeed has been substantially considered under the title "*res inter alios acta alteri nocere non debet.*" (*e*) There are, however, some exceptions to the rule excluding it. The first is, that where a part of a document or statement is used as self-disserving evidence against a party, he has a right to have the whole of it laid before the jury, who may then consider, and attach what weight they see fit to any self-serving statements it contains. (*f*) This exception is founded on the plain principle of justice that, by using a man's statement against him you adopt that statement, as evidence at least. The civilians seem to have gone further. "Observe," says Pothier, (*g*) "that when I have no other proof than your confession, I can not divide it. Suppose, for instance, that I claim from you two hundred livres, which I allege that you have borrowed, and of which I demand the payment; you admit the loan, but add, that you have repaid it. I can not found a proof of the loan upon your confession, which is, at the same time, a proof of payment; for I can only use it against you such as it is, and taking it all together. *Si quis confessionem adversam allegat, vel depositionem testis, dictam cum sua quantitate approbare tenetur.*" This was probably just enough under their judicial system; but with us, while the whole statement

(*e*) *Supra*, ch. 5.

(*f*) Tayl. Ev. § 655, 4th. Ed.; Peake Ev. 16, 5th Ed.; 2 Ev. Poth. 156–158; Randle v. Blackburn, 5 Taunt. 245; Thomson v. Austen, 2

D. & Ry. 358; Smith v. Blandy, Ry. & M. 257; Darby v. Ouseley, 2 Jur., N. S. 497.

(*g*) 1 Ev. Poth. § 799.

must be received, the credit due to each part must be determined by the jury, who may believe the self-serving and disbelieve the self-disserving portion of it, or vice versa. (*h*) Again, a person on his trial may, at least if not defended by counsel, state matters in his defense which are not already in evidence, and which he is not in a condition to prove, and the jury may act on that statement if they deem it worthy of credit. (*i*) Care must likewise be taken not to confound self-serving evidence with *res gestæ*. The language of a party, accompanying an act which is evidence in itself, may form part of the *res gestæ*, and be receivable as such.

521. We return therefore to the more important and difficult subject of self-disserving evidence. This may be supplied by words, writing, signs, or silence. "Non refert an quis intentionem suam declaret verbis, an rebus ipsis, vel factis." (*j*)<sup>1</sup> Words addressed to others, and writing, are no doubt the most usual forms; but words uttered in soliloquy seem equally receivable; (*k*) while of signs it has justly been said, "Acta exteriora indicant interiora secreta." (*l*)<sup>2</sup> Thus, a deaf and dumb person may be called on to plead, or to advocate his cause, through the medium of an interpreter who can explain his signs to the court and jury. (*m*) So of silence, "qui tacet, consentire videtur,"

(*h*) See *Baildon v. Walton*, 1 Exch. 617.

(*i*) See Bk. 4, pt. 1.

(*j*) 10 Co. 144a. See *Ford v. Elliott*, 4 Exch. 78.

(*k*) *R. v. Simons*, 6 C. & P. 540.

(*l*) 8 Co. 146b; *Wing. Max.* 108; *Broom's Max.* 296, 4th Ed.

(*m*) *R. v. Jones*, 1 Leach, C. L. 102; *R. v. Steel*, Id. 451.

It matters not whether a man declares his intention by words, or acts, or deeds.

<sup>2</sup> The secret intentions of the mind are manifested by the outward actions.

(*n*)<sup>1</sup>—a maxim which must be taken with considerable limitation. A far more correct exposition of the principle contained in it is the following: “*Qui tacet, non utique fatetur: sed tamen verum est, eum non negare:*” (*o*)<sup>2</sup> and one of our old authorities tells us with truth, “*Le nient dedire n'est cy fort come le confession est,*” (*p*)<sup>3</sup> which seems fully recognized in modern times. (*q*) The maxim is also found guarded in this way, “*Qui tacet consentire videtur, ubi tractatur de ejus commodo.*” (*r*)<sup>4</sup> The principal application of this maxim is in criminal cases, where a person charged with having committed an offense makes no reply; the force and effect of which will be more fully considered in another place. (*s*)

522. As to the different kinds of self-disserving statements. In the first place they are either “Judicial” or “Extra-judicial,”—in *judicio* or *extra judicium*, (*t*) according as they are made in the course of a judicial proceeding, or under any other circumstances.

523. 2. Self-disserving statements in civil cases are usually called “Admissions,” and those in criminal cases “Confessions.” The civilians and canonists express all kinds under the term “*confessio*.”

(*n*) 12 Hen. VIII. 8; Hob. 102; Jenk. Cent. 1, Cas. 64; Cent. 2, Cas. 30; Cent. 5, Cas. 87; Sext. Decretal. lib. 5, tit. 12, de reg. Juris, Reg. 43.

(*o*) Dig. lib. 50, tit. 17, l. 142. See also Sext. Decretal. lib. 5, tit. 12, de regulis juris, Reg. 44.

(*p*) Long. Quint. 125, 126.

(*q*) *Hayslep v. Gymer*, 1 A. & E.

162. See *Morgan v. Evans*, 3 Cl. & F. 205; *Gaskill v. Skene*, 14 Q. B. 664, and *Boyle v. Wiseman*, 10 Exch. 651.

(*r*) 20 Hen. VI. 13b.

(*s*) See *infra*, sect. 3, sub-sect. 3.

(*t*) 1 Greenl. Ev. § 216, 7th Ed.; 1 Ev. Poth. §§ 797, 801.

<sup>1</sup> He who is silent is considered as assenting.

<sup>2</sup> He who is silent does not thereby confess, but yet it is true that he does not deny.

<sup>3</sup> Denial is not as strong as confession.

<sup>4</sup> He who is silent is considered as assenting, when his own convenience is the subject-matter.

**524.** 3. Self-disserving statements are divisible into "Plenary" and "Not plenary." A "Plenary" confession is when a self-disserving statement is such as, if believed, to be conclusive against the person making it, at least on the physical facts of the matter to which it relates: as where a party accused of murder says, "I murdered," or "I killed," the deceased. In such cases the proof is in the nature of direct evidence, and the maxim is "*habemus optimum testem, confitentem reum.*" (*u*)<sup>1</sup> A confession "not plenary" is, where the truth of the self-disserving statement is not absolutely inconsistent with the existence of a state of facts different from that which it indicates; but only gives rise to a presumptive inference of their truth, and is therefore in the nature of circumstantial evidence. (*v*) *E.g.*, A. is found murdered, or the goods of B. are proved to have been stolen, and the accused or suspected person says, "I am very sorry that I ever had anything to do with A.," or "that I ever meddled with the goods of B." These expressions are obviously ambiguous; for, although consistent with an intention to avow guilt, they are equally so with an expression of regret, that circumstances should have occurred to cast unjust suspicion on the speaker. So where a person accused of an offense, admits that he intended or even threatened to commit it, or that he fled to avoid being tried for it. (*x*)

**525.** Although, as already stated, self-disserving evidence is in general admissible against the party supplying it, it has been made a great question, whether

(*u*) Ph. & Am. Ev. 419; 2 Hagg. Cons. Rep. 315.

(*v*) 3 Benth. Jud. Ev. 108.

(*x*) See *supra*, ch. 2, sect. 3, sub-section, 3.

<sup>1</sup> We have the best witness—a confessing defendant.

this extends to the proof of the contents of written instruments or documents—*i. e.*, whether the principle that such are the best or primary evidence of their own contents, does not override the principle under consideration.<sup>1</sup> Elementary as this point may seem, it has only

<sup>1</sup> But the rule seems to be settled in the United States that in regard to deeds or conveyances, declarations of a grantor to impeach his own deed are never competent. *Steward v. Thomas*, 35 Mo. 202; *Phoenix v. Ingraham*, 5 Johns. (N. Y.) 412; *Jackson v. Vredenburg*, 1 Id. 159; *Varick v. Briggs*, 6 Paige (N. Y.) 323; *Eckford v. De Ray*, 8 Id. 89; *Vrooman v. King*, 36 N. Y. 477; *Ward v. Saunders*, 6 Ired. (N. C.) L. 382; *Williams v. Clayton*, 7 Id. 442; *Ferguson v. Staver*, 33 Pa. St. 411; *Renwick v. Renwick*, 9 Rich. (S. C.) 50; *Cavin v. Smith*, 24 Mo. 221; *McCasland v. Carson*, 1 Head. (Tenn.) 117; *Bullard v. Billings*, 2 Vt. 309; *Brackett v. Wait*, 6 Id. 411; *Burton v. McKinstry*, 4 Minn. 204; *Derby v. Gallup*, 5 Id. 119; *Nichols v. Hotchkiss*, 2 Day (Conn.) 121; *Simpkins v. Rogers*, 15 Ill. 397; *Brashear v. Burton*, 3 Bibb. (Ky.) 9; *Sharp v. Wycliffe*, 3 Litt. (Ky.) 10; *Christopher v. Corrington*, 2 B. Mon. (Ky.) 357; *King v. Gray*, 6 Id. 368; *Merrweather v. Heman*, 8 Id. 162; *Gutliff v. Rose*, Id. 629; *Beall v. Barkley*, 10 Id. 261; *Short v. Tinsley*, 1 Metc. (Ky.) 397; *Pierce v. Faunce*, 37 Me. 63; *Hugh v. Soper*, 6 Har. & J. (Md.) 276; *Tyler v. Mather*, 9 Gray (Mass.) 177; *Gates v. Mowry*, 15 Id. 564; *Ferriday v. Selser*, 5 Miss. (4 How.) 506; *Merrill v. Dawson*, 1 Hempst. 563; *McKenzie v. Hunt*, 1 Port. (Ala.) 37; *Clemins v. Loggins*, 1 Ala. 622; *Price v. Branch Bank*, 17 Id. 374; *Cohn v. Mulford*, 15 Cal. 50; *Taylor v. Robinson*, 2 Allen (Mass.) 562; *Rust v. Mansfield*, 25 Ill. 336; *Myers v. McKinsie*, 26 Id. 36. Neither can declarations of a grantor, made before he conveyed the land, be given in evidence, to affect the title of his grantee. *Payne v. Craft*, 7 Watts & S. (Pa.) 458. Declarations of the maker of a deed attacked for fraud are not evidence in favor of those claiming under such deed. *Tucker v. Tucker*, 32 Mo. 464. Declarations of the grantor are not admissible evidence for one claiming under him. *Sasser v. Herring*, 3 Dev. (N. C.) Eq. 340. Admissions of a grantor, who is still living, made while holding the land, and having title of record thereto, unless in relation to the extent and character of his possession, can not be admitted against the grantee to defeat the title. *Carpenter v. Hollister*, 13 Vt. 552. Upon the question of the bona fides of a deed,

been settled of late years, if indeed it can be deemed fully settled even now; and there is probably not one question to be found in the whole law of England, which has

alleged to be in fraud of a contemplated marriage, what the husband, the grantor, said in favor of the deed, even before the marriage, is not admissible. *Pinner v. Pinner*, 2 Jones (N. C.) L. 398. But the declarations of a grantor, subsequent to the date of the conveyance, are admissible in evidence to oppose an allegation of fraud in procuring the execution of the deed. *Pierce v. Hakes*, 23 Pa. St. 231. The declarations of a person under whom a party derives title, made before or at the time of the sale, are admissible in evidence by the other party, to show fraud in the sale. *Satterwhite v. Hicks*, Busb. (N. C.) L. 105. In an action brought to set aside a grant as fraudulent, declarations of the grantor subsequent to the grant, were held, under the circumstances proved, to be competent evidence-in-chief to impeach the grant. *Savage v. Murphy*, 8 Bosw. (N. Y.) 75. Admissions of a grantor against his own interest, tending to establish a sufficient consideration for the deed (he being an original party to the record and identified in interest with the plaintiffs), are admissible against them as part of the *res gestæ*. *Spaulding v. Hallenbeck*, 39 Barb. (N. Y.) 79. In a suit by a grantor's heirs against his grantee, to recover possession by reason of a breach of a condition in the deed, the grantor's declarations, tending to show a performance of the condition, were held admissible. *Id.* On an issue as to fraud in a conveyance, the statement of the defendant, made after the transfer, is competent as against himself, but not as against his assignee. *Enders v. Richards*, 33 Mo. 598; *Kieth v. Kerr*, 17 Ind. 284; *Zimmerman v. Lamb*, 7 Minn. 421. The declarations of a father, who made a deed to a son, are competent evidence that the deed was intended as an advancement. *Speer v. Speer*, 14 N. J. Eq. (1 McCart.) 240. Declarations of a vendor of land, by parol contract, that he would not make a deed until his vendee had paid a specified balance of purchase money, in the absence of precise evidence of the terms of the contract, is evidence for the vendee of how much is due to the vendor. *Reed v. Reed*, 12 Pa. St. 117. Where the grantor of land, having obtained possession of the deed surreptitiously from the grantee, re-conveyed the same to a third person, who had knowledge of the first conveyance, the declarations of the second grantee, previous to the second conveyance, are admissible in an action by the heir of the first

caused greater difference of opinion. After a long series of irreconcilable dicta and rulings at *Nisi Prius*, (*y*) the subject came before the Court of Exchequer in Michaelmas Term, 1840, in the case of *Slatterie v. Pooley*. (*z*) There the question was, whether a debt for which an action had been brought by one J. T. against the plaintiff, was included in the schedule to a certain composition deed. The schedule being inadmissible as evidence for want of a proper stamp, a verbal admission by the defendant, that the debt in question was the same with that entered in the schedule, was rejected by Gurney, B., at *Nisi Prius*; on the ground that the contents of a written instrument, which is itself inadmissible for want of a proper stamp, can not be proved by parol evidence of any kind. The plaintiff having been nonsuited, a rule was obtained for a new trial against which cause was shown, and several of the previous cases cited. The court, however,—consisting

(*y*) These will be found collected Monthly Law Mag. vol. 5, p. 175.  
in an article by the author in the (*z*) 6 M. & W. 664.

grantee against the second. *Davis v. Spooner*, 3 Pick. (Mass.) 284. Where a deed of land, executed and acknowledged by the grantor, was delivered by him to two of the three grantees therein named, by whom it was retained for some time, without being recorded, and was then given back by them, without the knowledge or consent of the third grantee, to the grantor, by whom the same was destroyed, and the grantor subsequently died—the declaration of the grantor, that he had made such a deed, is admissible in evidence, after his death, against his heirs or devisees. *Hodges v. Hodges*, 2 Cush. (Mass.) 455. The conduct and declarations of a grantor, before the conveyance, respecting an estate conveyed, and tending to prove a fraudulent intention on his part to defeat his creditors, are proper evidence to be submitted to a jury, upon an inquiry as to the validity of such conveyance, by a creditor who alleges it to be fraudulent. *Bridge v. Eggleston*, 14 Mass. 245; *McDowell v. Goldsmith*, 6 Md. 319; *Head v. Halford*, 5 Rich (S. C.) Eq. 128.



of Parke, Alderson, Gurney, and Rolfe, BB.,—having taken time to consider, unanimously made the rule absolute, without hearing counsel in support of it. Parke, B., in delivering his judgment, says, p. 668: “We who heard the argument (my brother Alderson, who is absent, as well as ourselves) entertain no doubt that the defendant’s own declarations were admissible in evidence, to prove the identity of the debt sued for with that mentioned in the schedule, although such admissions involved the contents of a written instrument not produced; and I believe my Lord Abinger, who was not present at the argument, entirely concurs. The authority of Lord Tenterden at *Nisi Prius*, in the case of *Bloxam v. Elsee*, (a) is no doubt to the contrary: but since that case, as well as before, there have been many reported decisions, that whatever a party says, or his acts amounting to admissions, are evidence against himself, though such admissions may involve what must necessarily be contained in some deed or writing, . . . and any one experienced in the conduct of causes at *Nisi Prius*, must know how constant the practice is. Indeed, if such evidence were inadmissible, the difficulties thrown in the way of almost every trial would be nearly insuperable. The reason why such parol statements are admissible, without notice to produce, or accounting for the absence of the written instrument is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded, from the presumption of its untruth arising from the very nature of the case, where better evidence is withheld, whereas what a party himself admits to be true, may reasonably be presumed to be so. The weight

(a) Ry. & M. 187; 1 C. & P. 558.

and value of such testimony is quite another question. That will vary according to the circumstances, and it may be in some cases quite unsatisfactory to a jury. But it is enough for the present purpose to say that the evidence is admissible."

**526.** The authority of *Slatterie v. Pooley*, at least so far as relates to extra-judicial statements, has been recognized and acted on in a great many cases; (*b*) but has been severely attacked in Ireland, (*c*) and has been questioned in this country. (*d*) In *Lawless v. Queale*, (*e*) Lord Chief Justice Pennefather, speaking of that case, says: "The doctrine there laid down is a most dangerous proposition; by it a man might be deprived of an estate of £10,000 per annum, derived from his ancestors by regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear they heard the defendant say he had conveyed away his interest therein by deed, or had mortgaged or otherwise encumbered it; and thus by the facility so given, the most open door would be given to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty." Now, we must protest in toto against trying the admissibility of evidence by such a test as this. The most respectable and innocent man in the community may be hanged for mur-

(*b*) *Howard v. Smith*, 3 Scott, N. R. 574; *Boulter v. Peplow*, 9 C. B. 493; *Pritchard v. Bagshawe*, 11 Id. 459; *King v. Cole*, 2 Exch. 628; *Boileau v. Rutlin*, 2 Exch. 665; *Ridley v. The Plymouth Grinding Company*, 2 Exch. 711; *Toll v. Lee*, 4 Id. 230; *Murray v. Gregory*, 5 Exch. 468; *R. v. The Inhabitants of Basingstoke*, 14 Q. B. 611; *R. v. Welch*, 2 Car. & K. 296; 1 Den. C. C. 199; *Ansell v. Baker*, 3

Car. & K. 145; &c.

(*c*) *Lawless v. Queale*, 8 Ir. Law Rep. 382.

(*d*) *Tayl. Ev.* §§ 382 *et seq.*, 4th Ed.; *Sanders v. Karnell*, 1 F. & F. 356.

(*e*) *Lawless v. Queale*, 8 Ir. Law Rep. 382. See the observations of Crampton, J., in that case; and also *Thunder v. Warren*, Id. 181

der on the unsupported testimony of a pretended accomplice ; or sent to penal servitude for rape, on the unsupported oath of an avowed prostitute ; but is this a reason for altering the law with reference to the admissibility of the evidence of accomplices or prostitutes, or do innocent men feel themselves in danger from it ? The weight of the species of proof under consideration varies *ad infinitum*. Look at the different forms in which it may present itself—plenary confession in *judicio* ; non-plenary confession in *judicio* ; plenary quasi judicial confession before a justice of the peace ; non-plenary quasi judicial confession before a justice of the peace ; plenary extra-judicial confession to several respectable witnesses ; the like to one such witness ; non-plenary extra-judicial confession to several respectable witnesses ; the like to one such ; plenary extra-judicial confession to several suspected witnesses ; the like to one such ; non-plenary extra-judicial confession to several suspected witnesses ; the like to one such ; and under the term “ non-plenary ” is included every possible degree of casual observation, or even sign, from which the existence of the principal fact may be collected. The shade between the probative force of any two of these degrees is so slight as to be almost imperceptible, and yet of all forms of evidence, the highest of these is perhaps the most satisfactory, and the lowest the most dangerous. The value of self-disserving evidence, like that of every other sort of evidence, is for the jury ; its admissibility is a question of law—the test of which is, to see if the evidence tendered is in its nature original and proximate ; (*f*) and it will scarcely be contended, that self-disserving statements of all kinds do not fulfill both those conditions. It

(*f*) See bk, 1, pt. 1, §§ 88, 89, 90.

may, indeed, be objected that they usually come in a parol or verbal shape, and that parol evidence is inferior to written; but that is a maxim which has been much misunderstood. (*g*) The contents of a document could most unquestionably be proved, by a chain of circumstantial evidence composed of acts, every link in which might be established by parol or verbal testimony.

527. But although a party might admit the contents of a document, he could not, before the 17 & 18 Vict. c. 125, by admitting the execution of a deed (except when such admission was made for the purpose of a cause in court) dispense with proof of it by the attesting witness. The rule "*omnia præsumuntur rite esse acta*" was here reversed; the courts holding that although a party admitted the execution of a deed, the attesting witnesses might be acquainted with circumstances relative to its execution, which were unknown to the party making the admission, and which might have the effect of invalidating the deed altogether. (*h*) The decisions establishing this dogma were previous to *Slatterie v. Pooley*, and seem to have been a remnant of the old practice of trying deeds by the witnesses to them. (*i*) And the rule was not affected by the alteration made in the law by 14 & 15 Vict. c. 99, which rendered the parties to a suit competent witnesses. (*k*) But now, by the 17 & 18 Vict. c. 125, s. 26, any instrument, to the validity of which attestation is not requisite, "may be proved by admission or otherwise, as if there had been no attesting witness thereto."<sup>1</sup>

(*g*) See bk. 2, pt. 3, § 223.

Sefton, 2 East, 183; *Barnes v. Trompowsky*, 7 T. R. 265.

(*h*) *Call v. Dunning*, 4 East, 53; *Abbot v. Plumbe*, 1 Dougl. 216; *Johnson v. Masn*, 1 Esp. 89; *Cunliffe v.*

(*i*) See bk. 2, pt. 3, §§ 220-221.

(*k*) *Whyman v. Garth*, 8 Exch. 803

<sup>1</sup> See *ante*, note 1, p. 900.

528. So far as its admissibility in evidence is concerned, it is in general immaterial to whom a self-dis-serving statement is made. (1) <sup>1</sup> But if coming

(1) The old French lawyers drew party or to strangers. See 1 Ev. Poth. some nice distinctions as to the effect § 801. of statements made to the opposite

<sup>1</sup> Of course the question of admissibility of confessions, must depend generally upon the circumstances of each case. *United States v. Mott, McLean*, 449. When there is evidence from which a jury may reasonably infer that an offense was committed, sufficient foundation is laid for admitting the voluntary confession of a prisoner; *State v. Saleyer*, 4 Minn. 368; but where the charge is not made out, conversation or confession extorted by fear or hope, can not be used; *State v. Doherty*, 2 Overt. (Tenn.) 80; but the confession must be voluntary; if made through the influence of hope or fear, the confession is not admissible. *United States v. Pumphreys*, 1 Cranch C. Ct. 74; *United States v. Hunter*, Id. 317; *United States v. Charles*, 2 Id. 76; *United States v. Pocklington*, Id. 293; *Aixen v. State*, 35 Ala. 399; *Aaron v. State*, 39 Id. 75; *State v. Muhland*, 16 La. Ann. 376; *State v. Kirby*, 1 Strobb, 155; *People v. Fowler*, 18 How. (N. Y.) Pr. 493; *People v. Thoms*, 3 Park. Cr. R. 355; *People v. Wentz*, 37 N. H. 303; *Miller v. State*, 40 Ala. 54; *Rutterford v. Commonwealth*, 2 Metc. (Ky.) 387; *State v. Nelson*, 3 La. Ann. 497; *State v. Grant*, 21 Me. 171; *Commonwealth v. Taylor*, 5 Cush. (Mass.) 605; *Jordan v. State*, 32 Miss. 382; *Spears v. Ohio*, 2 Ohio St. 583; and see *United States v. Charles*, 2 Cranch C. Ct. 76; *United States v. Kurtz*, 4 Id. 682. A confession of a prisoner, taken on oath, can not be used against him. *United States v. Duffy*, 1 Cranch C. Ct. 164; *United States v. Bascadore*, 2 Id. 30. The rule, excluding statements, made under oath by a person charged with crime, is founded upon the unreliable character of such statements; and therefore, where a man, having been arrested by a constable, without warrant, upon suspicion of having committed murder, was examined as a witness at the coroner's inquest, statements made by him are not admissible against him on his trial for the crime itself. *People v. McMahon*, 15 N. Y. 384. Confessions of a prisoner charged with murder are admissible in evidence, though made to a bailiff who told him that truth was the best policy; that, if he did the act, it was the

under the head of what the law recognizes as confidential communication, it will not be received in evidence; (m) neither will it, if embodied in a communication

(m) See *infra*, ch. 8.

best to confess it; but if he did not, there was no wish that he should say so. *Aaron v. State*, 37 Ala. 106; Ala. Sel. Cas. 12. *S. P. Hawins v. State*, 7 Mo. 190. Confessions of a prisoner may be admitted in evidence as voluntary, although made to an officer who had him in custody, and who told him that if he knew anything about the circumstances it would be best to tell the truth about it, and although another officer had falsely told him, for the purpose of forcing a confession, that a supposed accomplice had been arrested and shot. *King v. State*, 40 Ala. 314. Where a person was on trial for larceny, and confessed his guilt, but there was nothing in his confession which led to the discovery of the stolen property, or any other facts or circumstances by which the truth of such confession was established, such confession is inadmissible as evidence against him when on trial for the crime so confessed. *People v. Ah How*, 34 Cal. 218. Nor will a confession be rejected because made in answer to a question which assumed his guilt. So where a committing officer asked a person charged with murder "whether if it was to do over again he would it?" the latter answered, "Yes, sir-ree, Bob," this answer, with evidence as to his manner in making it, was held admissible in evidence. *Carrol v. State*, 23 Ala. 28. But evidence of confession, in a capital case, will always be cautiously received. *State v. Fields, Peck* (Tenn.) 140.

Nor will confessions of the accused be excluded, because the facts confessed have been already proved. *Austin v. State*, 14 Ark. 556. A confession made by a prisoner, voluntarily and freely, without promise or threat, to an officer having him in legal custody, was held competent evidence in *Commonwealth v. Mosler*, 2 Pa. St. 264; *State v. Simon*, 15 La. An 568; *Commonwealth v. McGown*, 2 Pars. (Pa.) Sel. Cas. 341. But see *Dick v. State*, 30 Miss. 593. Evidence of what a prisoner said to a witness in urging the witness to use his influence that he might be permitted to testify against his associates, is admissible against the prisoner. *State v. Thomson, Kirby* (Conn.) 345. And where an accomplice receives a stipulation from the public prosecutor that he will not be prosecuted if he turn state's evidence, and, under such stipulation, makes

made "without prejudice," the object of such being to buy peace, and settle disputes by compromise instead of by legal proceedings. (n) It has indeed been held

(n) *Cory v. Bretton*, 4 C. & P. 462; *dock v. Forrester*, 3 M. & Gr. 903. *Healey v. Thatcher*, 8 Id. 388; *Pad-*

a confession, if upon the trial he refuse to testify, such confession may be used in evidence against his accomplices at the trial. *Commonwealth v. Knapp*, 10 Pick. 477, *ante*, note 1, p. 772. It is the duty of committing magistrates, on preliminary investigations, to advise the prisoner as to his rights, as to refusing to answer questions put to him; but if he then volunteers a confession, it can be used against him on his trial. *State v. Lamb*, 28 Mo. 218; but see *Commonwealth v. Harman*, 4 Pa. St. 269, to the contrary. The testimony of a man, on trial for murder, given on a coroner's inquest, may be used against him on his trial. *People v. Thayers*, 1 Park. (N. Y.) Cr. 595; *People v. McMahon*, 2 Id. 663; *Hendrickson v. People*, 10 N. Y. (2 Seld.) 13; *Williams v. Commonwealth*, 29 Pa. St. 102. It is the duty of an examining magistrate before whom a prisoner charged with felony is brought, to reduce the examination to writing; but if he did not, and it appears that he did not, evidence may be given of such prisoner's confessions at the time. *State v. Parish*, Busb. (N. C.) L. 239. *S. P. State v. Irwin*, 1 Hayw. (N. C.) 112. The public prosecutor may offer parol evidence, on trial of a prisoner, of what the latter swore to in making a complaint of a third party before a magistrate. Such complaint having been made by advice of the prisoner's father, and in hope of being state's evidence, is not to be excluded as a confession made under inducements. *People v. Burns*, 2 Park. (N. Y.) Cr. 34. What a party says when examined as a witness in a legal proceeding, may be used in evidence against him; *Hendrickson v. People*, 1 Park. (N. Y.) Cr. 406; *State v. Broughton*, 7 Ired. (N. C.) L. 96; and having been warned of his rights by the magistrate, any confessions made by him, if reduced to writing by the magistrate, may be real in evidence against him on his trial; subject, however, to be impeached, as other testimony. *Alfred v. State*, 2 Swan. (Tenn.) 581. But facts obtained by means of confessions induced by appliances of hope or fear, may be given in evidence. *Gates v. People*, 14 Ill. 433; *United States v. Richard*, 2 Cranch C. Ct. 439; *People v. Hoy Ten*, 34 Cal. 176; *Jane v. Commonwealth*, 2 Metc. (Ky.) 30; *Frederick v. State*, 3 W. Va. 695. It is the province of the court to deter-

that, in order to render an account stated binding on a party, the admission of liability must be made to the opposite party or his agent; (*o*) but this only refers to the effect of the admission, not to its admissibility. A distinction was formerly sought to be drawn, where a confession was made by a prisoner, in consequence of an inducement to confess, held out by a party who had no authority over him or the charge against him. Although such an inducement does not exclude confessions made to others, (*p*) it was doubted whether it would not exclude confessions made to the person holding out the inducement: but this distinction has been overruled. (*q*)

(*o*) *Breckon v. Smith*, 1 A. & E. per Parke, B.  
488, per Little Dale, J.; *Hughes v.* (*p*) *R. v. Dunn*, 4 C. & P. 543; *R.*  
*Shorpe*, 5 M. & W. 667, per Parke, v. *Spencer*, 7 Id. 776.  
*B.*; *Bates v. Townley*, 2 Exch. 156, (*q*) *R. v. Taylor*, 8 C. & P. 733.

mine whether the confession of a prisoner is voluntary or not. *Simon v. State*, 5 Fla. 285; *Whaley v. State*, 11 Ga. 123; *State v. Ostrander*, 18 Iowa, 435; *Hudson v. Commonwealth*, 2 Duv. (Ky.) 531; *Cain v. State*, 18 Tex. 387. And see as to what degree of influence will vitiate a confession, *State v. Harman*, 3 Harr. (Del.) 567. Where the original confessions were made under undue or improper influence, his subsequent confessions will be inadmissible against him, unless it is shown that such influence has ceased to operate. *Love v. State*, 22 Ark. 336; *Bob v. State*, 31 Ala. 560; *Joe v. State*, 38 Ala. 422; *People v. Jim Ti*, 32 Cal. 60; *State v. Gregory*, 5 Jones (N. C.) L. 315; *Moor's Case*, 2 Leigh (Va.) 701. And where the confession is offered in evidence in connection with some inducement held out to him to make it, if the confession is not so connected with the inducement as to be a consequence of it, it is to be considered as voluntary. *State v. Potter*, 18 Conn. 166. If a prisoner makes a confession, believing himself to be speaking under oath, his statements are inadmissible in evidence. *Schoeffer v. State*, 3 Wis. 828; *United States v. Williams*, 1 Cliff. 5.

<sup>1</sup> See cases cited in the preceding note. The confession of one under arrest for a crime that he did commit, is inadmis-



**529.** Self-disserving statements, &c., made by a party when his mind is not in its natural state, ought in general, to be received as evidence, and his state of

sible when it appears that the officer having him under arrest, said to him, "If you are guilty, you had better own it." *State v. York*, 37 N. H. 175. But it was held in *Fouts v. State*, 8 Ohio St. 98, that the confession of one charged with murder is not rendered incompetent by the circumstance that the witness told him that "if he was guilty, it could not put him in any worse condition, and he had better tell the truth at all times." The rule, however, is variable by the circumstances. So where an officer, who had a prisoner in charge, told him he had better tell him all about the matter, and if he would, he would not appear against him, and that the prisoner had better turn state's evidence, whereupon the prisoner made a full confession to the officer—held, that the confession so obtained could not be given in evidence against the prisoner, and that the proper time of objection was before the officer had given his testimony, and not during the instruction of the jury. *Couley v. State*, 12 Mo. 462. Where one of the company engaged in the apprehension of the prisoner, in the presence of the officer, and the prosecutor held out promises of benefit to him, under the influence of which he made a confession—held, that such confession was not admissible in evidence. *Morehead v. State*, 9 Humph. (Tenn.) 635. A person committed on a charge of larceny, by a justice, was sent, in charge of a special constable and the prosecutor, to jail, and on the way, the constable said to him, "You had as well tell all about it." They then rode on about a mile, after this remark, without any other remark being addressed to the prisoner, after which time he voluntarily said to the prosecutor, "I will tell you all about it;" and proceeded to tell how and by whom the breaking and larceny was committed. Held, that the constable was one in authority over him, and the statement was not admissible in evidence. *Vaughn v. Commonwealth*, 17 Gratt. (Va.) 576. A prisoner charged with homicide was taken before a committing magistrate, and there sworn, and told, "If you do not tell the truth, I will commit you." Held, that a confession thus exacted was inadmissible on the trial, as evidence against him. *Commonwealth v. Harman*, 4 Pa. St. 269. And where a previous confession is unduly obtained, any subsequent confession given on its basis is inadmis-

mind should be taken into consideration by the jury as an infirmative circumstance. (r) Thus a confession made by a prisoner when drunk has been received;

(r) "Circa ejusmodi instrumenta vinum, somnium, dementiam emissæ;"  
firmanda vel destruenda, multum habet Quint. Inst. Orat. lib. 5, c. 7.  
operis oratio, si quæ sint voces per

sible. *Commonwealth v. Harman*, 4 Pa. St. 269. Where confession was offered to be proved, the court permitted the evidence thus offered to be interrupted for the purpose of showing that a previous confession, by which it was induced, was unduly obtained; *Id.*; and it has been held that the presumption is, if one confession be obtained by influence, that all subsequent confessions flow from the same influence, and this presumption is to be overcome before the confession can be given in evidence. *State v. Guild*, 10 N. J. L. (5 Hals.) 163; *Peter v. State*, 12 Miss. (4 Smed. & M.) 31; *State v. Roberts*, 1 Dev. (N. C.) L. 259. But a confession made under influence of a promise of some collateral benefit, no hope or fear being held out in respect to a criminal charge under which the person was lying at the time, it has been held, will not exclude the confession. *State v. Wentworth*, 37 N. H. 169. But see *Commonwealth v. Tuckerman*, 10 Gray (Mass.) 173. An officer with a warrant against a man for stealing a cow, after searching his house, said to him, "Where did you get that beef? We've got you this time. We have traced it round until we are satisfied you've got the cow" (referring to a different cow); and carried him to jail. Held, that this did not render incompetent confessions afterwards made to the officer at the jail, of having stolen the cow mentioned in the indictment. *Commonwealth v. Whittmore*, 11 Gray (Mass.) 201. Notice to one charged with larceny, by his employer, that he would be discharged, unless he settled for the stolen property with the owner, but that if he would settle he should be kept at work, and a promise by the employer to say nothing about it to hurt him, if he would settle, do not render confessions subsequently made, in the same conversation, incompetent. *Commonwealth v. Howe*, 2 Allen (Mass.) 153. Where the prisoners were witnesses before the coroner's jury, some of the jury told them that their stories were contradictory, and that they had better confess, and sent a person to advise them to confess; and the next day they did confess to another, who was

(s)<sup>1</sup> and although contracts entered into by a party in a state of total intoxication are void, it is otherwise where the intoxication is only partial, and not sufficient

(s) *R. v. Spilsbury*, 7 C. & P. 187.

not present when the above advice was given; the confession was admitted. *Lynes v. State*, 36 Miss. 617. The mere fact that the defendant in a criminal case was urged to state and to state quickly, where he was at a particular time, does not render his statement inadmissible as a confession. *State v. Howard*, 17 N. H. 171. A statement by a jailor, after the arrest of a prisoner, "that if the commonwealth should use any of them as witnesses, he supposed it would prefer her to either of the others," who were arrested and charged with the same offense, will not exclude a voluntary confession made by her, on the same day, to a magistrate, after the magistrate had told her such confession might be used as evidence against her. *Fife v. Commonwealth*, 29 Pa. St. 429. On an indictment for murder, it appeared that when the prisoner was first arrested, one of the two special constables who had him in charge, said to him: "Come, Jack, you might as well out with it;" that the magistrate interposed and warned him not to confess; and that some hours afterwards the prisoner made confessions to B., who was in no position of authority over him, but with whom, and in his buggy, as a convenient mode of transportation, he was riding to jail, the two constables being near, but not within hearing,—held, that the confessions to B. were admissible. *State v. Vaigneur*, 5 Rich. (S. C.) 391. Where the mind has been placed under restraints by hope or fear, for the purpose of forcing a confession, it must clearly appear that, prior to the confession, it had become again totally free, else the confession will not be

<sup>1</sup> But see *Commonwealth v. Howe*, 9 Gray (Mass.) 110, where it was held that confessions made by one so intoxicated as not to understand them, are no evidence against him. It was ruled in that case that the question whether a party making confessions was too intoxicated to understand them, was a question for the jury. But see *Eskridge v. State*, 25 Ala. 30, which holds that the fact that a defendant was intoxicated, that he was excited and scattering in his conversation, and that no one who heard him could repeat what he said, does not render his declarations of guilt inadmissible.

to prevent his being aware of what he is doing. (t) So, what a person has been heard to say while talking in his sleep, seems not to be legal evidence against

(t) *Gore v. Gibson*, 13 M. & W. 623; See also *Mascard. de Prob. Concl.* 9 Jur. 140 and the note there, p. 142. 580.

admissible. *McGlothlin v. State*, 2 Coldw. (Tenn.) 223. A person who lives in the jailer's family where a prisoner is confined, and who sometimes has the keys of the jail, and when the jailer is absent has control of the jail, but who is not a sworn officer of any kind, is not a "person in authority" whose persuasions or threats addressed to the prisoner will exclude his confession. *Shifft's case*, 14 Gratt. (Va.) 652. Where a confession is obtained by a promise to put an end to a prosecution, such confession is inadmissible as evidence. *Boyd v. State*, 2 Humph. (Tenn.) 39. Torture, to extort confession, is indictable at common law. *State v. Hobbs*, 2 Tyler, (Vt.) 308. A prisoner's confession, not made to one in authority, nor in consequence of inducements held out by any one in authority, is inadmissible in evidence, although a conversation had previously been held by two private persons with the prisoner, in the presence of the jailer (conceding him to be one in authority), in which conversation the effect of a confession was discussed. *State v. Kirby*, 1 Strobh. (S. C.) 378. Where a prisoner, in speaking of the testimony of a witness, who had testified against him, said, "that what C. said was true as far as it went, but that he did not say all, or enough." Such answer is not admissible as a confession of the prisoner, and lays no foundation for proving what C. did swear to. *Finn v. Commonwealth*, 5 Rand. (Va.) 701. The confessions of a prisoner, made by him in the presence of a deputy sheriff, who had no control over the jail where he was confined, to a friend, who advised him to tell the truth, were held admissible. *State v. Gossett*, 9 Rich. (S. C.) 428. Where confessions were extorted from a prisoner, but afterwards not being actuated by the influence that had elicited the former confessions, he made other confessions of his guilt,—*Held*, that these latter confessions were admissible against him. *State v. Fisher*, 6 Jones (N. C.) L. 478; *State v. Hash*, 12 La. Ann. 895; *Senior v. State*, 36 Miss. 636; *State v. Carr*, 37 Vt 191. Confessions appearing to have been voluntary, made in jail, in presence of the jailer to the prosecutor, are admissible in evidence on a trial for stealing. *State v. Cook*, 15 Rich.

him, (*u*) however valuable it may be as indicative evidence; (*v*) for here the suspension of the faculty of judgment may fairly be presumed complete. (*w*)

(*u*) This point arose in the case of *B. v. Elizabeth Sippets*, Kent Summ. Ass. 1839, where Tindal, C. J., was inclined to think the evidence not receivable. *Ex relatione*. See also per Alderson, B., in *Gore v. Gibson*, 13 M. & W. 623, 627; 9 Jur. 140, 142.

(*v*) Bk. 1, pt. 1, § 93.

(*w*) Such a phenomenon may often be of the utmost importance as indicative evidence.

"Multi de magnis per somnum rebus loquuntur"

*Indicioque sui facti persæpe fuere.*"

LUCRETIVS, lib. 4, vv. 1012

—13. See also lib. 5, v.

1157.

"There are a kind of men so loose of soul,

That in their sleeps will mutter their affairs.

. . . . .

. . . . . Nay, this was but his dream.

But this denoted a foregone conclusion.

(S. C.) 29. In a prosecution for bigamy, admissions of the prior marriage by the defendant are competent in evidence, although made before the second marriage. *Stanglein v. State*, 17 Ohio St. 453. S. P., *Wolverton v. State*, 16 Ohio, 173. The confessions of a prisoner arrested for larceny may be given in evidence, though made after the owner of the goods had promised not to prosecute him. *Ward v. People*, 3 Hill (N. Y.) 395. If any inducement whatever of hope or fear be held out to a prisoner to make a confession, or his confession is brought about by threats or physical pain, his admissions thus made are not evidence against him. *People v. Smith*, 15 Cal. 408; *State v. Bostick*, 4 Harr.\* (Del.) 563; *Stephen v. State*, 11 Ga. 225; *Miller v. People*, 39 Ill. 457; *Smith v. State*, 10 Id. 106; *Commonwealth v. Chabcock*, 1

<sup>1</sup> So words uttered in sleep by a defendant in a criminal case, are not admissible in evidence against him. *People v. Robinson*, 19 Cal. 70. The confessions of an infant under 12 years of age are inadmissible without strong proof that he is *capax doli*. *State v. Aaron*, 4 N. J. L. 231. A confession made by a prisoner of feeble mind charged with murder, whether voluntary or made in the presence of a tumultuous mob which was threatening to hang him, is not convincing proof of his guilt; but it is for the jury to consider whether upon the facts of the case, and the other testimony, they believe it to be true. *Butler v. Commonwealth*, 2 Duv. (Ky.) 435.

The acts of persons of unsound mind also are not in general binding; but this is subject to some exceptions, which will be found collected in the case of *Molton v. Camroux*. (x)

'Tis a shrewd doubt, tho' it be but  
a dream."

OTHELLO, Act 3, Sc. 3.

The following excellent instance is taken from Mr. Arbuthnot's Reports of Criminal Cases in the Court of Foujdaree Udalt of Madras, p. 61. Five prisoners—named respectively Dasan, Nayakan, Nachan, Venkatachalam, Tandavaragan and Chokan—were tried in September, 1834, for the willful murder of one Perumal Naik. The deceased having been found murdered and much mutilated, the head lying on an ant-hill away from the rest of the body, suspicion fell on one Venkatasami, with whom he was on bad terms. Venkatasami's answers when questioned on the subject not being satisfactory, he was kept under surveillance in the house of a neighbor, and in the course of the following night was heard to talk

in his sleep, allowing the following expressions to escape him: "Dasan catch hold of the hands. Nachan, cut off the head. Tandavarayan, Chokan, and Venkatachalam, catch hold of his leg—come, we may go home after we have deposited the head on the top of an ant-hill." These words having been next morning reported to the authorities, Venkatasami was taken into custody and taxed with the murder, which he at once confessed, criminating the prisoners, whose names had been mentioned by him in his sleep, and who, on being apprehended, likewise confessed their guilt. Venkatasami and Nachan died before trial, but the other four were convicted, chiefly on their own confession, and left for execution.

(x) 2 Exch. 487; affirmed on error, 4 Id. 17.

Mass. 144; *McGlothlin v. State*, 2 Coldw. 223; *Hector v. State*, 2 Mo. 165; *State v. Guild*, 10 N. J. L. (5 Hals.) 163; *Wiley v. State*, 3 Coldw. (Tenn.) 362; *State v. Phelps*, 11 Vt. 116; *State v. Walker*, 34 Id. 296. Confession made under duress, can not be considered by the jury, if the only part of such confession, confirmed by other evidence, relates to a similar offense on another occasion, for which he is not on trial. *Warren v. State*, 29 Tex. 369. After it is known that any influence of hope or fear existed to induce a confession, explicit warning should be given the prisoner of the consequences of a confession; and it should also be clear that he thoroughly understands such warning, before his confessions are admissible. *Van Buren v. State*, 24 Miss. 512. Evidence is admissible, of facts ascertained by means of confessions of persons charged with crimes, made under the influence of threats or promises. *Duffy v. People*, 26 N. Y. 588; *People v. Ah Ki*, 20 Cal. 177; *Sarah v. State*, 28 Ga. 576; *State v. Cowan*, 7 Ired. (N. C.) L

**530.** A party is not in general prejudiced by self-disserving statements made under a mistake of fact. "Ignorantia facti excusat." (*y*) "Non videntur, qui errant consentire," (*z*)<sup>1</sup> and "Non fatetur qui errat," (*a*)<sup>2</sup> said the civilians. So, money paid under a forgetfulness of facts, which were once within the knowledge of the party paying, may be recovered back. (*b*) But it is very different when the confession is made under a mistake of law. Here the civilians say, "Non fatetur qui errat, nisi jus ignoravit." (*c*) Neither is a party to be prejudiced by a confessio juris, (*d*) although this must be understood with reference to a confession of law not involved with facts; for the confession of a matter compounded of law and fact is receivable. Every prisoner or defendant who pleads guilty in a criminal case, admits by his plea both the acts with which he is charged, and the applicability of the law to them. So, on an indictment for bigamy, the first marriage, even though solemnized in a foreign country, may be proved by the admission of the accused. (*e*)

**531.** Self-disserving statements may in general be made, either by a party himself, or by those under

(*y*) Lofft, M. 553.

(*z*) Dig. lib. 50, tit. 17, l. 116.

(*a*) 1 Ev. Poth. § 800.

(*b*) Kelly v. Solari, 9 M. & W. 54, and the cases there referred to.

(*c*) Dig. lib. 42, tit 2, l. 2; 1 Ev. Poth. § 800. See *suprà*, ch. 2, sect. 2,

sub-sect. 1.

(*d*) 1 Greenl. Ev. § 96, 7th Ed.

(*e*) 1 East. P. C. 471; R. v. Newton, 2 Moo. & R. 503; R. v. Simonsto, 1 Car. & K. 164. But see R. v. Flaherty, 2 Id. 782.

239; State v. Motley, 7 Rich. (S. C.) 327. Confession made by a prisoner to a fellow-prisoner who was serving out a term of imprisonment for crime, held admissible; Commonwealth v. Harlow, 3 Brews. (Pa.) 461; even though obtained by deceit, the person having been placed there for the purpose.

<sup>1</sup> Ignorance of a fact is ground of relief. They who mistake are not supposed to consent.

<sup>2</sup> He who mistakes does not confess.

whom he claims, or by his attorney or agent lawfully authorized—an application of the maxims, “*Qui per alium facit, per seipsum facere videtur* ;” (*f*) “*Qui facit per alium facit per se*.” (*g*)<sup>1</sup> This of course means, that the party against whom the admission or confession is offered in evidence, is of capacity to make such admission or confession. On this subject the civilians laid down, “*Qui non potest donare non potest confiteri*.” (*h*)<sup>2</sup> So there are some acts which can not be done by attorney, and some persons who can not appoint one,—as, for instance, infants. And the person appointed to act for another, can not delegate this authority to a third, it being a maxim of law, “*Delegata potestas non potest delegari*,” (*i*) “*Delegatus non potest delegare*.” (*k*)<sup>3</sup>

(*f*) Co. Litt. 258a ; 4 Inst. 109 ; 10 Co. 33b ; 2 Jur., N. S. 18. See also Sext. Decret. lib. 5, tit. 12, de reg. jur., Reg. 72. (i) 7 C. B., N. S. 496, 498 ; 2 Inst. 597.

(*g*) Lofft, M. 163 ; 9 Cl. & F. 850.

(*h*) 1 Ev. Poth. § 804.

(*k*) Brom's Max. 807, 809, 4th Ed. ; 3 M. & W. 319-20 ; 5 Bingh. N. C. 310 ; 8 C. B. 630.

<sup>1</sup> He who acts through another is regarded as acting himself.

<sup>2</sup> He who is not able to give is not able to confirm.

<sup>3</sup> A delegated power can not again be delegated.



## SECTION II.

## ESTOPPELS.

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532. An important distinction runs through the whole subject of self-disserving evidence, namely, that while in general its value is to be weighed by a jury, the law has invested some forms of it with an absolute and conclusive effect. Such are technically termed "Estoppels,"—a doctrine, the exposition of which in all its branches belongs rather to substantive than to adjective law. Some notice of its nature, and the general principles by which it is governed, are, however, indispensable here; and estoppels in criminal cases will be more particularly considered in the next section. (*l*)

533. Much misconception and prejudice have arisen, from the unlucky definition or description of

(*l*) *Infra*, sect. 3, sub-sect. I.

estoppel given by Sir Edward Coke, namely, that it is where "a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." (*m*) If this is looked on as a definition, it violates the rules of logic, by defining by the genus, and non-essential difference or accident; and if as a description, which indeed Sir Edward Coke himself calls it, it is almost equally objectionable; for one would imagine from the above language, that truth was the enemy which the law of estoppel was invented to exclude. So far, however, was this from being the case, that its object is to repress fraud and harassing litigation, and to render men truthful in their dealings with each other; and there can be no question that, rightly understood and properly applied, it often produces those effects, and is a valuable auxiliary in the hands of justice. The definition given in the *Termes de la Ley* (*n*) is much better: "Estoppel is when one man is concluded and forbidden in law to speak against his own act or deed; yea, though it be to say the truth." Still "forbidden to say the truth" sounds harsh; and both definitions are inadequate, as not including all the cases to which the term "Estoppel" is applicable. On the whole an estoppel seems to be when, in consequence of some previous act or statement to which he is either party or privy, a person is precluded from showing the existence of a particular state of facts. Estoppel is based on the maxim, "*Allegans contraria non est audiendus*;" (*o*)<sup>1</sup> and is that species of presumptio

(*m*) Co. Litt. 352a. See also 2 Co. 542.

4b.

(*o*) 4 Inst. 279; Jenk. Cent. 2 Cas.

(*n*) *Termes de la Ley*, tit. Estoppel. 63; Broom's Max. 169, 4th Ed.  
See to the same effect, 1 Lill. Pr. Reg.

<sup>1</sup> A party offering evidence contrary to his plea is not to be heard.

juris et de jure, where the fact presumed is taken to be true, not as against all the world, but as against a particular party, and that only by reason of some act done:—it is in truth a kind of argumentum ad hominem. (*p*) Hence it appears that “Estoppels” must not be understood as synonymous with “Conclusive evidence;” the former being conclusions drawn by law against parties from particular facts, while by the latter is meant some piece or mass of evidence, sufficiently strong to generate conviction in the mind of a tribunal, (*q*) or rendered conclusive on a party, either by common or statute law.

534. “Estoppels,” it has been said, are “a head of law once tortured into a variety of absurd refinements but now almost reduced to consonancy with the rules of common sense and justice. . . . In our old law books, truth appears to have been frequently shut out by the intervention of an estoppel, where reason and good policy required that it should be admitted. . . . However, it is in no wise unjust or unreasonable, but, on the contrary, in the highest degree reasonable and just, that some solemn mode of declaration should be provided by law, for the purpose of enabling men to bind themselves to the good faith and truth of representations on which other persons are to act. Interest republicæ ut sit finis litium<sup>1</sup>—but, if matters which have been once solemnly decided were to be again drawn into controversy, if facts once solemnly affirmed were to be again denied whenever the affirmant saw his opportunity, the end would never be of litigation and

(*p*) See the judgment of the court in *Barons in Machu v. The London and Collins v. Martin*, 1 B. & P. 648. *South-Western Railway Company*, 2

(*q*) See the observations of the Exch. 415.

<sup>1</sup> It is in the interest of the state that there be an end of litigation, *i. e.*, it is public policy to discourage litigation

confusion. It is wise, therefore, to provide certain means by which a man may be concluded, not from saying the truth, but from saying that that which, by the intervention of himself or his, has once become accredited for truth, is false. And probably no code, however rude, ever existed without some such provision for the security of men acting, as all men must, upon the representations of others." (r) "The courts have been, for some time, favorable to the utility of the doctrine of estoppel, hostile to its technicality. Perceiving how essential it is to the quick and easy transaction of business, that one man should be able to put faith in the conduct and representations of his fellow, they have inclined to hold such conduct and such representations binding, in cases where a mischief or injustice would be caused by treating their effect as revocable. At the same time, they have been unwilling to allow men to be entrapped by formal statements and admissions, which were perhaps looked upon as unimportant when made, and by which no one ever was deceived or induced to alter his position. Such estoppels are still, as formerly, considered odious." (s)

**535.** Several rules respecting estoppels are to be found in the books. The most important are the following, 1. That estoppels must be mutual or reciprocal, *i. e.*, binding both parties. (t)<sup>1</sup> But this does not hold universally ; for instance, a feoffor, donor, lessor,

(r) 2 Smith, Lead. Cas. 656, 5th. Ed. Ed.

See also per Curiam, in Cuthbertson v. Irving, 4 H. & N. 758.

(t) Com. Dig. Estoppel, B.; Co. Litt. 352a ; Cro. Eliz. 700, pl. 16.

(s) 2 Smith. Lead. Cas. 725-6, 5th

<sup>1</sup> Both parties must be bound, or neither is estopped. Longwell v. Bentley, 3 Grant (Pa.) Cas. 177 ; Schuhman v. Garratt, 16 Cal. 100 ; Bolling v. Mayor, 3 Rand. (Va.) 563.

&c. by, deed poll will be estopped by it, although there is no estoppel against the feoffee, &c. (*u*) Mr. J. W. Smith, in the work already cited, (*x*) suggests that the rule will be found to apply to those cases only, where both parties are intended to be bound.

**536.** In general estoppels affect only the parties and privies to the act working the estoppel; strangers are not bound by them, and can not take advantage of them. (*y*)<sup>1</sup> When, however, the record of an estoppel runs to the disability or legitimation of the person, strangers shall both take the benefit of, and be concluded by that record; as in case of outlawry, excommunication, profession, attainder of *præmunire*, of felony, &c. (*z*) But a record concerning the name, quality, or addition of the person has not this effect. (*a*)

**537. 3.** It seems that conflicting estoppels neutralize each other, or, as our books express it, "Estoppel against estoppel doth put the matter at large." (*b*)<sup>2</sup>

(*u*) Co. Litt. 47b; 363b.

(*z*) Co. Litt. 352b.

(*x*) 2 Smith, Lead. Cas. 660, 5th Ed.

(*a*) Id.

(*y*) Co. Litt. 352a; Com. Dig. Es-  
toppel, B. & C.

(*b*) Id.; 2 Smith. Lead. Cas. 660,  
5th Ed.; R. v. Houghton, 1 E. & B.  
506, per Lord Campbell, C. J.

<sup>1</sup> Estoppels bind only parties and privies, and can be taken advantage of only by those who are bound by them; and to be binding they must be mutual. *Griffin v. Richardson*, 11 Ired. (N. C.) L. 439; *Deery v. Cray*, 5 Wall. 795; *Nutwell v. Tongue*, 22 Md. 419; *Williams v. Chandler*, 25 Tex. 4; *Brain-tree v. Higham*, 17 Mass. 432; *Worcester v. Green*, 2 Pick. (Mass.) 425; *Lauger v. Filton*, 1 Rawle (Pa.) 141; *Griggs v. Smith*, 12 N. J. L. (7 Hals.) 22. They can only be asserted or pleaded by one who was affected by the act which constitutes the estoppel. *Miles v. Miles*, 8 Watts & S. (Pa.) 135. One who is not bound by an estoppel can not take advantage of it. *Lansing v. Montgomery*, 2 Johns. (N. Y.) 382.

<sup>2</sup> *Carpenter v. Thompson*, 3 N. H. 204. So a party in laches can not complain of the neglect or delay of his adversary arising from that laches.

Thus, if the plaintiff in action makes title to a common by grant within time of memory, and then in another action between the same parties makes title by prescription, and the other admits this;—this last estoppel shall avoid the first estoppel, so that the plaintiff may make title to the common by prescription. (*c*) So, where in a *præcipe quod reddant* against two, who pleaded joint tenancy with a third, the demandant said, that formerly he bought a writ against one of the two, who pleaded joint tenancy with the other, whereby the writ abated; on which he purchased this writ by journeys accounts, averring that the two were sole tenants on the day of the first writ, &c., whereon the tenants vouched the third party with whom they had pleaded joint tenancy: on its being objected that this voucher could not be received, because they had supposed him joint tenant with them, it was answered that, as the plaintiff had alleged that the defendants were sole tenants, he had ousted himself of the right to estop them from that voucher. (*d*)

**538.** Estoppels are of three kinds. (*e*) 1. By matter of record. 2. By deed. (*f*) 3. By matter in pais.

**539.** 1. Estoppels by matter of record; as letters patent, fine, recovery, pleading, &c. (*g*) The most important form of this is estopped by judgment, which will be considered under the head of *res judicata*. (*h*)

**540.** With respect to estoppels by pleading. A

(*c*) 1 Roll. Abr. 874, pl. 50, citing 11 Hen. VI. 27b, 28a.

(*d*) Fitz. Abr. Estop. pl. 3, citing 41 Edw. III. 5, pl. 11. For other instances, see 1 Roll. Abr. 874, 875; and D'Anvers' Abridgment Estoppel, S.

(*e*) Co. Litt. 352a; 2 Smith, Lead. Cas. 657, 5th Ed.

(*f*) Coke (in loc. cit.) says, "matter

in writing." But it is clear that "deed" was meant; and in our old books the word "writing" is constantly used in that limited sense. See bk. 2, pt. 3, ch. 1, § 217, note (*k*), and § 225, note (*i*).

(*g*) Co. Litt. 352a; Com. Dig. Estoppel; A. 1; 1 Roll. Abr. 862 *et seq.* tit. Estoppel.

(*h*) *Infra*, ch. 9.

party who does not plead within the time required by law, is taken to confess that his adversary is entitled to judgment. So a party may, by resorting to one kind of plea, be concluded from afterwards availing himself of another. It is a well-known rule of pleading, that pleas in abatement can not be pleaded after a party has pleaded in bar, and that pleas to the jurisdiction can not be pleaded after pleas in abatement.<sup>1</sup>

<sup>1</sup> So if a party, instead of taking advantage of an estoppel by demurrer or plea, takes issue on the matter of estoppel, the estoppel is waived. *Burdit v. Burdit*, 2 A. K. Marsh. (Ky.) 143; *Keel v. Ogden*, 3 Dana (Ky.) 103; *Brinsmaid v. Mayo*, 9 Vt. 31. Where the matter on which an estoppel arises has not appeared in the preceding pleadings, it is unnecessary to plead it specially. *Howard v. Mitchell*, 14 Mass. 241; *Adams v. Barnes*, 17 Id. 365. An estoppel is to be pleaded where the matter to be concluded appears on the record; otherwise where it is introduced on the general issue. *Davis v. Thomas*, 5 Leigh (Va.) 1. Only a technical estoppel, as one by deed to the party pleading, or to one under whom he claims, or by matter of record, need be pleaded specially; other estoppels, being *in pais*, can not be specially pleaded, but must be given in evidence to the court and jury, and may operate as effectually as technical estoppels under the direction of the court. *Hostler v. Hays*, 3 Cal. 302. After joinders on an issue of fraud in obtaining a discharge, an estoppel can not be taken advantage of against the party pleading the fraud; but it must be pleaded. *Sawyer v. Hoyt*, 2 Tyler (Vt.) 288. If, to a plea of former recovery, the plaintiff reply that the causes of action are not the same, the issue is for a jury. *James v. Lawrenceburgh Insurance Co.*, 6 Blackf. (Ind.) 525. One unsuccessfully pleading an estoppel is not afterwards precluded from confessing and avoiding or traversing the allegations of his adversary. *Dana v. Bryant*, 6 Ill. (1 Gilm.) 104. A jury is bound by an estoppel, and the court will disregard a finding contrary thereto, except where the party has waived his rights by mispleading. *Bufferlow v. Newson*, 1 Dev. (N. C.) L. 208. Where an estoppel is offered in evidence, the jury are not precluded from finding the truth of the case. *Elliott v. Eslava*, 3 Al. 568. Where A. brought trespass *quare clausum* against B., to which B. pleaded title in C., under whom he claimed without

**541.** As to the effect of admissions, express or implied, in pleadings: the following rule, which certainly savors of technicality, is laid down in the books: viz., that the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, can not be again litigated between the same parties, and are conclusive evidence between them, but only if the traverse is found against the party making it. (*i*) But whether, and to what extent, the admitting or passing over a traverseable allegation in pleading, is to be deemed an admission of it for the purposes of evidence of the trial, is a question which has given rise to a considerable conflict of authority and opinion. (*j*)<sup>1</sup>

(*i*) Per Parke, B., in delivering the judgment of the court in *Boileau v. Rutlin*, 2 Exch. 665. See *Robins v. Lord Maidstone*, 4 Q. B. 811; *Brook Abr. Protestacion*, pl. 14; and *Co. Litt.* 124b.

(*j*) The following are the principal cases on this subject:—*Edmunds v.*

*Groves*, 2 M. & W. 642. *Bennion v. Davison*, 3 Id. 179; *Smith v. Martin*, 9 Id. 305; *Carter v. James*, 13 Id. 137; *Meiklejohn*, 8 Exch. 634; *Bingham v. Stanley*, 2 Q. 117; *Robins v. Lord Maidstone*, 4 Id. 811; *Bonzi v. Stewart*, 4 M. & Gr. 295; *Fearn v. Filica*, 7 Id. 513.

showing how C.'s title was derived or when it accrued; A. may give in evidence an award against the title of C., without pleading it. *Shelton v. Alcox*, 11 Conn. 240. Where a writing is brought in by a party merely as evidence, the other party may avail himself of it as an estoppel, at any time while it is competent for the court to instruct the jury as to the effect of evidence. *Hall v. Haun*, 5 Dana (Ky.) 55. A party relying on matter of estoppel must plead it, if he have opportunity. If not, it may be given in evidence under the general issue. *Howard v. Mitchell*, 14 Mass. 241; *Isaacs v. Clark*, 12 Vt. 692; *Woodhouse v. Williams*, 3 Dev. (N. C.) L. 508; *McNair v. O'Fallon*, 8 Mo. 188; *Lord v. Bigelow*, 8 Vt. 461.

<sup>1</sup> Where the appearance of a defendant to a suit is of record, it can not be denied by plea or otherwise. *Thompson v. Emmert*, 4 McLean, 96, and *Reed v. Pratt*, 2 Hill (N. Y.) 64. A defendant, after appearing and obtaining a rule that the complainant shall give security for costs, is estopped to



**542. 2.** Estoppels by deed. "*Nemo contra factum suum proprium venire potest.*" (*k*) "A deed," says Mr. Justice Blackstone, (*l*) "is the most solemn and

(*k*) 2 Inst. 66; Lofft, M. 322.

(*l*) 2 Blackst. Com. 295.

object to the subpoena not having been served on him. *Dunn v. Keegin*, 4 Ill. (3 Scam.) 292. Where plaintiff in replevin in his declaration, alleges defendant to be in possession of property, and detaining the same from him, he is estopped from denying defendant's possession at the time of action brought. *Kingsbury v. Buchanan*, 11 Iowa, 387. And so, if he alleges in his declaration the incorporation of the defendants, he is estopped to deny that they had a charter. *Hinsdale v. Larned*, 16 Mass. 65. Plaintiff, in an action on a promissory note, is not estopped from asserting his title to the note by the record of a former unsuccessful suit which he, as the attorney for the payee, instituted in the name of the latter; such record is admissible in evidence, if at all, only as tending to show want of title in the present plaintiff; and where evidence on this point is conflicting, it is a question for the jury. *Wheeler v. Ruckman*, 1 Robt. (N. Y.) 408; 2 Abb. Pr. N. S. 186. The admission by a defendant, in his original answer, that he married the deceased, will not estop him from amending his pleadings, by alleging the absolute nullity of such a marriage. *Summerlin v. Livingston*, 15 La. Ann. 519. Where a defendant's answer admitted an indebtedness to the plaintiff to a certain amount, but averred that a considerable sum was due from the plaintiff to him, the admission is conclusive as to the item confessed. *Betal v. Mougin*, 17 La. Ann. 289. As against a purchaser at a sale, the defendant in a foreclosure suit is estopped from denying the truth of her answer. *McGee v. Smith*, 13 N. J. L. (1 Green) 462. One of M.'s heirs brought a bill in equity against his executors and other persons interested in the estate, alleging due execution of such will by M., but averring that the trusts therein were repugnant to law and void, and praying a distribution of M.'s estate as in cases of intestacy. Admission of the due execution of a will by a party defendant, does not, under certain circumstances, estop him from denying its valid execution and opposing its probate, when offered to be proved before the surrogate. *Mason v. Alston*, 9 N. Y. 28. A defendant, by permitting the death of one of the plaintiffs to be suggested on the record, without opposition, before the trial commences, admits the suggestion to be true. *Hender-*

authentic act that a man can possibly perform, with relation to the disposal of his property ; and therefore a man shall always be estopped by his own deed, or not permitted to aver or prove anything, in contradiction to what he has once so solemnly and deliberately avowed." This rule, however, must be understood to apply, only where an action is brought to enforce rights arising out of the deed, and not collateral to it ; (*m*) and it does

(*m*) *Wiles v. Woodward*, 5 Exch. 557, 563.

*son v. Reeves*, 6 Blackf. (Ind.) 101. One who has paid money into court, upon a quantum meruit count, is estopped to deny the contract as alleged. *Huntington v. American Bank*, 6 Pick. (Mass.) 340. Where a plaintiff's attorney has returned the defendant's answer because he deems it frivolous, and the defendant afterwards admits in court that he no longer deems it effectual as an answer, the latter is estopped from claiming that it is an answer, so as to prevent a default. *Hoffaring v. Grove*, 42 Barb. (N. Y.) 548. Where a defendant serves copies of affidavits on a plaintiff, the originals of which are on file, he can not afterwards object to reading the copies in evidence, but they are to be considered as equivalent to office copies. *Jackson v. Harrow*, 11 Johns. (N. Y.) 434. Where the party entitled to draw up an order, drew it up, and sanctioned the entry of it, as of the time when the decision was made, and served a copy of such order upon the adverse party—held, that he could not be permitted to allege that the order was not entered at the time when it purported to have been. *Whitney v. Belden*, 4 Paige (N. Y.) 140 ; *North American Coal Co v. Dyett*, Id. 273.

Parties are bound by the written admissions made in the progress of a cause, and can not repudiate them at pleasure. *Elwood v. Lannon's Lessee*, 27 Md. 200. Admission made in the progress of a suit, as a substitute for proof of any material fact, or by pleading, and setting forth the particular facts, as grounds of complaint or of defense, amount in law to estoppels ; but they are only so as to the parties to the suit, and in the same suit in which they are made. *Carradine v. Carradine*, 33 Miss. 698. Proving a debt, and receiving a dividend, under an unconstitutional insolvent law, does not estop the party to deny that he assented to the insolvent's discharge. *Kimberly v. Ely*, 6 Pick. (Mass.) 440.

not include the case of a mere general recital in a deed, such general recital not having the effect of an estoppel. (*n*) This is on the principle "*generale nihil certum implicat*;" (*o*) it being a rule that an estoppel must be certain to every intent, and is not to be taken by argument or inference; (*p*) and therefore it is only a special recital of a particular fact in a deed which will estop. (*q*) Many cases illustrative of this distinction are to be found in the reports; (*r*) and the principle governing the subject has thus been laid down: "It seems clear that where it can be collected from the deed, that the parties to it have agreed upon a certain admitted state of facts, as the basis on which they contract the statement of those facts, though but in the way of recital, shall estop the parties to aver the contrary." (*s*) Perhaps this would have been more correct if, instead of saying merely, "the parties have agreed," it had been added, "or must be taken to have agreed." When a recital is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument. (*t*)<sup>1</sup>

(*n*) 32 Hen. VI. 16; 35 Id. 34; 2 Leon. 11, l. 17. See the judgment in *Lainson v. Tremere*, 1 A. & E. 801-2.

(*o*) 2 Co. 33b; 8 Co. 98a.

(*p*) Co. Litt. 352b and 303a.

(*q*) See 2 Smith, L. C. 706, 5th Ed.; 1 Wms. Saund. 216; 6th Ed.; *Lainson v. Tremere*, 1 A. & E. 792; *Carpenter v. Buller*, 8 M. & W. 209.

(*r*) See 1 Rol. Abr. 872, Estoppel (P); 1 Wms. Saund. 216, 6th Ed.; 3 Leon. 118, pl. 168.

(*s*) Per Coltman, J., in delivering the judgment of the C. P. in *Young v. Raincock*, 7 C. B. 338; recognized and confirmed in *Stroughill v. Buck*, 14 Q. B. 787.

(*t*) *Stroughill v. Buck*, 14 Q. B. 787.

<sup>1</sup> A party will not be allowed to controvert the declaration he has made by deed; *Redman v. Bellamy*, 4 Cal. 247; *Lajoie v. Primar*, 3 Mo. 529; *Pennel v. Veyant*, 2 Harr. (Del.) 501; *Payne v. Atterbury*, 11 Harr. (Mich.) 414; *Ridgely v. Bond*, 18 Md. 433; *Campbell v. Knights*, 24 Me. 332; unless it be shown to have been procured by fraud; *Norton v. Sanders*, 7

**543. 3. Estoppels by matter in pais.**—Of these, Parke, B., in delivering the judgment of the Court of Exchequer, in *Lyon v. Reed*, (*u*) says, “The acts in

(*u*) 13 M. & W. 285, 309. See also *Alderson v. Collman*, 4 Man. & Gr. 209. the judgment of Tindal, C. J., in *San-*

*J. J. Marsh. (Ky.)* 12; duress or error; *McRae v. Creditors*, 16 La. Ann. 305. In order to create an estoppel by recital in a deed, the matter must be directly and precisely alleged, and with certainty to every intent. *McComb v. Gilkey*, 29 Miss. 146. As a general rule, an estoppel does not grow out of a recital. To give it that effect, it must show that the object of the parties was to make the matter recited a fixed fact, as the basis of their action. *Hays v. Askew*, 5 Jones (N. C.) L. 63. The parties to deeds are estopped to deny the truth of the recitals therein; and if the deeds are offered only to show the transmission of the legal title, the truth of the recitals need not be proved aliunde. *Bank of United States v. Benning*, 4 Cranch C. Ct. 81. Recitals in a deed are binding upon all claiming under the deed. *Douglas v. Scott*, 5 Ohio, 194; 7 Ohio, Part 1, 227; *Denn v. Brewer*, 1 N. J. L. (Coxe) 172; *Inskeep v. Shields*, 4 Harr. (Del.) 345; *Byrne v. Morehouse*, 22 Ill. 603; *McCesky v. Leadbetter*, 1 Ga. 551; *Stewart v. Butler*, 2 Serg. & R. (Pa.) 381; *Jackson v. Parkhurst*, 9 Wend. (N. Y.) 209; *Carver v. Jackson*, 4 Pet. 1; *Crane v. Morris*, 6 Pet. 598. The record of a deed made by an attorney will be notice to, and operate as an estoppel upon, his grantee subsequently taking a deed from him in his own name; *Lee v. Getty*, 26 Ill. 76; and the deed of an attorney, in trust, will operate as an estoppel against him and all those claiming under him. *Id.* An attorney, executing a deed, is not himself estopped by the covenants therein. *Kerr v. Chalfant*, 7 Minn. 487. The doctrine of estoppel, as applicable to deeds without warranty, applies to married women. *Graham v. Meek*, 1 Carg. 325. Where the parties derive title to real estate from a common source, they are estopped from denying the seizin and title of the original claimant from whom they derive title. And where parties, deriving, would thus be estopped, their heirs and privies in estate are likewise estopped. *Royston v. Wear*, 3 Head. (Tenn.) 8; *Murphy v. Barnett*, 2 Murph. (N. C.) 251; *Gardner v. Sharp*, 4 Wash. 609; *Ellis v. Jeans*, 7 Cal. 409; *Bridge v. Wellington*, 1 Mass. 219; *McClain v. Gregg*, 2 A. K. Marsh. (Ky.) 454. Neither party to a deed of bargain and sale is estopped to show that one of the

pais which bind parties by way of estoppel are but few, and are pointed out by Lord Coke, Co. Lit. 352a. They are all acts which anciently really were, and in contemplation of law have always continued to be, acts of notoriety, not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like. Whether a party had or had not concurred in an act of this sort, was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed." But, for the reasons already stated, (*v*) the courts of law in modern times, adopting a principle long known in courts of equity, (*x*) have wisely extended this species of estoppel beyond its ancient limits; and although the actual decisions respecting its application in certain cases may admit of question, the following rule has been laid down by authority, and may be looked on as established. "Where one by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. (*y*)<sup>1</sup> It has,

(*v*) *Supra*, § 534.

3rd Ed.

(*x*) 1 Fonbl. Eq. bk. 1, ch. 3, sect. 4,

(*y*) *Pickard v. Sears*, 6 A. & E. 469,

bargainors was a feme sole, although the deed recites that she was covert. *Brinegar v. Chaffin*, 3 Dev. (N. C.) L. 108. Where plaintiff and defendant derived title under a person once in possession claiming the fee, neither is at liberty to show that such title is not still a good and subsisting one, unless one can show that he has acquired another and a better title from some other person. *Johnson v. Watts*, 1 Jones (N. C.) L. 228. A grantee is not estopped by the recitals in the deed from giving the truth in evidence to support it, if the other party goes behind the deed to defeat it. *Crosby v. Chase*, 17 Me. 369.

<sup>1</sup> Matters of estoppel *in pais* consist of the acts or declara-

indeed, been said, that unless the representation amounts to an agreement or license by the party who makes it, or is understood by the party to whom it is

474; *Freeman v. Cooke*, 2 Exch. 654, *Clarke v. Hart*, 6 Ho. Lo. Cas. 633.  
 633; *Howard v. Hudson*, 2 E. & B. 1; 644, 655-6, 669; *Cornish v. Abington*,  
*Simpson v. The Accidental Death In-* 4 H. & N. 549; *Gregg v. Wells*, 10 A.  
*urance Company*, 2 C. B., N. S. 289; & E. 90.  
*Dunston v. Paterson*, Id. 495, 501-4;

tions of a person, by which he designedly induces another to alter, injuriously to himself, his previous position. *Brown v. Wheeler*, 17 Conn. 345; *Kirney v. Farnsworth*, Id. 345; *Rangeley v. Spring*, 21 Me. 130; *Cummings v. Webster*, 43 Id. 192; *Matthews v. Light*, 32 Me. 305; *Quirk v. Thomas*, 6 Mich. 76; *Wells v. Pierce*, 27 N. H. (7 Fost.) 503; *Simons v. Steele*, 36 N. H. 73; *Richardson v. Chickering*, 41 N. H. 380; *Martin v. Righter*, 10 N. J. Eq. (2 Stock.) 510; *Corkhill v. Landers*, 44 Barb. (N. Y.) 218; *Baker v. Seeley*, 17 How. (N. Y.) Pr. 297; *Arnold v. Comman*, 50 Pa. St. 361; *Strong v. Elsworth*, 26 Vt. 366; *Cowles v. Bacon*, 21 Conn. 451; *Hawley v. Middlebrook*, 28 Id. 527; *Stone v. Britton*, 22 Ala. 543; *Bank v. Wollastown*, 3 Harr. (Del.) 90; *Bryon v. Walton*, 14 Ga. 185; *Buckhalter v. Edwards*, 16 Ga. 593; *Burton v. Black*, 32 Ga. 53; *Niantic Bank v. Dennis*, 37 Ill. 381; *Williams v. Jackson*, 28 Ind. 334; *Tappan v. Morseman*, 18 Iowa, 499; *Lasselle v. Barnett*, 1 Blackf. (Ind.) 150; *Laski v. Goldman*, 18 La. Ann. 294; *Forysth v. Day*, 46 Me. 176; *Plumer v. Lord*, 9 Allen (Mass.) 455; *Cook v. Finkler*, 9 Mich. 131; *Wyman v. Perkins*, 39 N. H. 218; *White v. Langdon*, 30 Vt. 599; *Allen v. Winston*, 1 Rand. (Va.) 65; *Preston v. Mann*, 23 Conn. 118; *Whitacre v. Culver*, 8 Minn. 133; *Heath v. Derry Bank*, 44 N. H. 174. Whatever the motive may be, one who so acts or speaks that the natural consequence of his words or conduct will be to influence another to change his conduct, is legally chargeable with an intent or willful design to induce the other to believe him, and to act upon that belief, if such proved to be the actual result. But, as the doctrine of estoppel especially concerns conscience and equity, ignorance—unaccompanied with culpability of any kind—ought to excuse conduct and language, which would otherwise render the author justly responsible for their effect. There are cases, however, where the excuse of ignorance can not be permitted to avail, without defeating the very principle of justice upon which the doctrine of estoppel is founded.

made as amounting to that, the above rule would not apply. (2) But it would seem that, at least in equity, the application of the rule is not thus limited. (a) Moreover, by "willfully" in this rule must be understood, not that the party represents that to be true which he knows to be untrue, but only that he means his representation to be acted upon, and that it is acted upon accordingly. For if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take his representation to be true, and believe that it was meant that he should act upon it; and the party to whom it was made does act upon it as true, the party making the representation will be equally precluded from contesting its truth. (b)<sup>1</sup> And

(2) *Freeman v. Cooke*, 2 Exch. 654, 664; *Clarke v. Hart*, 6 Ho. Lo. Cas. 633, 641, 656; *Cornish v. Abington*, 4 H. & N. 549, 555.

(a) See per Lord Shelborne, C., *Citizens' Bank of Louisiana v. First National Bank of New Orleans* (in Dom.

Proc.), L. Rep., 6 Ap. Ca. 352, 360.

(b) *Freeman v. Cooke*, 2 Exch. 654, 663; *Howard v. Hudson*, 2 E. & B. 1; *Cornish v. Abington*, 4 H. & N. 549, 555; *White v. Greenish*, 11 C. B., N. S. 209, 230.

*Preston v. Mann*, 25 Conn. 118. There is no estoppel without proof that the claimant had knowledge of the acts or sayings, and relied on them, and not on his own judgment. *McCune v. McMichael*, 29 Ga. 312.

<sup>1</sup> To the operation of the rule it is necessary: 1. That the action or declaration of the person must be willful (*i. e.*, with knowledge of the facts upon which his rights depend, or with an intention to deceive the other party); 2. He must at least be aware that he is giving countenance to an alteration of the conduct of the other whereby he will be injured, if the representation is untrue; and the other must appear to have changed his position by reason of such inducement. *Copeland v. Copeland*, 28 Me. 525; *Califf v. Hillhouse*, 3 Minn. 311; *Taylor v. Zepp*, 14 Mo. 482; *Martin v. Angell*, 7 Barb. (N. Y.) 407; *Otis v. Sill*, 8 Id. 102; *Carpenter v. Stillwell*, 12 Id. 128; *Commonwealth v. Moltz*, 10 Pa. St. 527; *Eldred v. Hazlett*, 33 Id. 307; *Shaw v. Beebe*, 35 Vt. 205; *Wooley v. Edson*, Id. 214. There must be deception and change of conduct, in consequence, to estop a party from showing the truth. *Davidson v. Young*, 38 Ill. 145; *Wilson v. Cartro*, 31 Cal.

conduct, by negligence or omission, where a duty is cast upon a person by usage of trade as otherwise, to disclose the truth, may often have the same effect. As, for instance, where a retiring partner omits to inform his customers, in the usual mode, of the fact, that the continuing partners are no longer authorized to act as his agents; he is bound by all contracts made by them with third persons, on the faith of their being so authorized. (c) <sup>1</sup>

**544.** It has been made a question, whether estoppels in pais can be pleaded; the objection being, that to plead matter in pais by way of estoppel, is a violation

(c) *Freeman v. Cooke*, 2 Exch. 654. *Scotland v. Needell*, 1 F. & F. 461.  
663. See also *The Western Bank of*

420; *Andrews v. Lyon*, 11 Allen (Mass.) 349; *Hazelton v. Batchelder*, 44 N. H. 40; *Lawrence v. Brown*, 5 N. Y. (1 Seld.) 394; *Jewett v. Miller*, 10 N. Y. (6 Seld.) 402; *Ryerss v. Farwell*, 9 Barb. (N. Y.) 615; *Hawley v. Griswold*, 42 Id. 18; *Garlinghouse v. Whitwell*, 51 Id. 208; *Brubaker v. Okeson*, 36 Pa. St. 519; *Diller v. Brubaker*, 52 Id. 498; *Dorrah v. Bryant*, 56 Id. 69; *Williams v. Chandler*, 25 Tex. 4; *Hicks v. Cram*, 17 Vt. 449; but an estoppel will never be allowed where it would itself perpetrate fraud, work injustice, or fail to protect the innocent. *Mills v. Graves*, 38 Ill. 455. Persons associated and acting under the name "United States Express Company" are estopped to deny that they are a corporation. *United States Express Co. v. Bedbury*, 34 Ill. 459. A partner who, in purchasing property, so acts as to make the seller think that he is selling to the firm, is estopped to claim that he was the sole purchaser. *White Mountain Bank v. West*, 46 Me. 15.

<sup>1</sup> But an estoppel in pais can only be set up as a means to prevent injustice. *Thomas v. Bowman*, 29 Ill. 426; *Pierrepoint v. Barnard*, 5 Barb. 364. They are not allowed to operate except where, in good conscience and honest dealing, the party ought not to be permitted to gainsay his admission. *McAfferty v. Conover*, 7 Ohio St. 99. Where an act admits of two constructions, the one rightful and the other wrongful, the rightful character will be imputed to it, and the party will not be heard to aver that he acted wrongfully, or be allowed to take advantage of his own wrong. *Blount v. Robeson*, 3 Jones (N. C.) Eq. 73.



of the rule of pleading, which prohibits the putting on the record any matter of evidence, however conclusive. But the point having been expressly raised on demurrer to a replication, in a case of *Sanderson v. Collman*, (d) was unanimously overruled by the Court of Common Pleas. Tindal, C. J., there said, 'If we find upon the record, a fact which would have entitled the plaintiffs to a verdict, I do not see why they may not rely upon that fact by way of estoppel. Estoppel may be by matter of record, by deed, and by matter in pais. If by the last branch is meant, only that the matter may be given in evidence, it would certainly not be pleadable, and ought not to be put on the record. But there seems to be no reason why the meaning should be so confined . . . . Lord Coke, speaking of estoppel by matter in pais, refers to estoppel by acceptance of rent; and it may be said that this naturally would be matter of evidence; but looking at the whole of the context, he appears to me to be treating it as being on the record, rather than as a matter for the jury.' And Coltman, J., adds, "The meaning of the rule, I apprehend, is, that a party shall not plead facts from which another fact, material to the issue, is to be inferred . . . . I think that if a party has a legal defense to that which is set up against him, he can not be precluded from pleading such defense." There is, however, this great distinction between estoppels by record or by deed and estoppels in pais, namely, that the former must, in order to make them binding, be pleaded, if there be an opportunity, otherwise the party omitting to plead the estoppel waives it, and leaves the issue at large, on which the jury may find according to the truth; while with respect

(d) *Sanderson v. Collman*, 4 Man. & Gr. 209. See *Hallifax v. Lyle*, 3 Exch. 446.

to estoppels in pais, they need not, at least in most cases, be pleaded in order to make them obligatory. (*e*) Thus, where a man represents another as his agent, in order to procure a person to contract with him as such, and he does contract, the contract binds in the same manner as if he had made it himself, and is his contract in point of law; and no form of pleading could leave such a matter at large, and enable the jury to treat it as no contract. (*f*) This distinction is said not to be recognized in America; (*g*) and it has been objected to on the ground, that it appears inconsistent that the principle of the authority of *res judicata* should govern the decision of a court, when the matter is referred to them by pleading the estoppel, but that a jury should be at liberty to disregard this principle altogether; and that the operation of such an important principle as that of *res judicata*, should depend upon the technical forms of pleading in particular actions. (*h*) But the distinction is not without reason. Where a party intends to conclude another by an estoppel, he ought to give him an opportunity of deliberately replying to it, and not spring it upon him at *Nisi Prius*. With due notice, the adversary might be able to show that the matter relied on as an estoppel was not such in reality, as not relating to the property or transaction in controversy; or, if it were, that its effect had been removed by matter subsequent, as, for instance, that the party pleading the estoppel had, by some other proceeding, concluded himself from taking the objection,

(*e*) *Freeman v. Cooke*, 2 Exch. 654, 662; 1 Wms. Saund. 325a, n. (*d'*), 6th Ed.; 2 Smith, Lead. Cas. 672, 707, 709, 5th Ed.; *Treviban or Trevivan v. Lawrence*, 2 Lord Raym. 1036 and 1048; 1 Salk. 276; *Magrath v. Hardy*,

4 Bingham. N. C. 782; *Lord Feversham v. Emerson*, 11 Exch. 385.

(*f*) *Freeman v. Cooke*, 2 Exch. 654, 662.

(*g*) 1 Greenl. Ev. § 531, 7th Ed.

(*h*) Ph. & Am. Ev. 512.

—estoppel against estoppel setting the matter at large; (*i*) or, when the estoppel relied on is a judgment, that that judgment had been reversed on error, or deprived of binding force by an act of parliament, &c. The willfully keeping back an estoppel, is not only evidence of unfair dealing and a desire to surprise; but, to divest it of its conclusive effect, is a just punishment on the party who has unnecessarily called the jury together, and wantonly occasioned the expense of a trial. It may be asked, why then are estoppels by matter in pais conclusive on the jury, seeing that they may be pleaded? That is probably a remnant of the old notion, that matters in pais were matters of notoriety to the jury coming de vicineto, (*k*) who therefore ought not to be required to find against their personal knowledge; whereas deeds and judgments are dead proofs; (*l*) the former of which were supposed to lie in the peculiar knowledge of the witnesses, and the latter being on record in the courts.<sup>1</sup>

545. Before dismissing the subject of estoppel, we would direct attention to the question, whether the maxim of the civil law, "*Allegans suam turpitudinem (or suum crimen) non est audiendus*,"<sup>2</sup> is, or ever was a maxim of the common law. Littleton (*m*) puts the following case: "If a man be disseised, and the disseisor maketh a feoffment to divers persons to his use, and the disseisor continually taketh the profits, &c., and the disseisee release to him all actions real, and after he sueth against him a writ of entry in nature of an assize

(*i*) *Supra*, § 537.

(*k*) See *supra*, § 543.

(*l*) Bk. 1, pt. 2, § 119.

(*m*) Sect. 499.

<sup>1</sup> But see *Bank v. Wollaston*, 3 Har. (Del.) 90, which seems to hold that an estoppel in pais is not pleadable.

<sup>2</sup> One will not be allowed (or heard) to criminate himself.

by reason of the statute, because he taketh the profits &c. Quære, how the disseisor shall be aided by the said release; for if he will plead the release generally then the demandant may say, that he had nothing in the freehold at the time of the release made; and if he plead the release specially, then he must acknowledge a disseisin, and then may the demandant enter into the land, &c., by his acknowledgment of the disseisin, &c. But peradventure by special pleading he may bar him of the action which he sueth, &c., though the demandant may enter." Sir Edward Coke, (*n*) in commenting on the word "he must acknowledge a disseisin," gives the following case: "In a writ of dower the tenant pleaded, that before the writ purchased A was seised of the land, &c. until by the tenant himself he was disseised, and that hanging the writ A recovered against him, &c.; judgment of the writ, and adjudged a good plea, in which the tenant confessed a disseisin in himself." For this is cited 15 Edw. IV. 4 B., (*o*) and correctly, except that instead of "recovered against him," it should be "re-entered upon him." There are some other cases in the Year Books to the same effect. Thus in the 5 Edw. IV. 5 B. pl. 23, in a *præcipe quod reddat*, the tenant showed that, long before the writ purchased one H was seised until disseised by him, and that H entered the hanging the writ, judgment of the writ, and adjudged good plea as was said; the reporter, however, adding. "*Sed non interfui*." And in the case already cited from the 15 Edw. IV., Littleton himself is reported to have put this case, which however goes much beyond the others, "If I disseise P and levy a fine to you, and then P enters upon you, and enfeoffs me and you enter on me, and I bring an assize, and you plead

(*n*) Co. Litt. 287a.(*o*) Pl. 7.

the fine in bar, I may avoid the fine by the matter aforesaid, so a man may take advantage of his wrong done by himself, &c." But, on the other hand, Sir Edward Coke either forgot these authorities and the passage in his own first Institute, or he supposed some distinction between pleading and evidence as to the principle in question; for in the 4th Inst. 279, when speaking of witnesses, he lays down the maxim in its terms, "*Allegans suam turpitudinem non est audiendus*;" but only cites for it a case of Rich. de Raynham, in the C. P. in 13 Edw. I. But in *Collins v. Blantern*, (*p*) in 1767, which has become a leading case, (*q*) it was held that, to an action on a bond, the defendant may plead that it was given by him for an illegal and corrupt consideration. In *Lutterell v. Reynell*, (*r*) T. 29, Car. II., which was an action of trespass for taking money, on its being excepted against the plaintiff's evidence, that if it were true it destroyed the plaintiff's action, inasmuch as it amounted to prove the defendant guilty of felony; it was, says the reporter, "agreed that it should not lie in the mouth of the party to say that himself was a thief, and therefore not guilty of the trespass." On the trial of Titus Oates for perjury, in 1685, (*s*) the court rejected the testimony of a person who came to swear that he had, by persuasion of the defendant, perjured himself on a former occasion; Lord Chief Justice Jefferies pronouncing such evidence to be "very nauseous and fulsome in a court of justice." So on the trial of Elizabeth Canning for perjury, in 1754, (*t*) on the question being raised, Legge, B., said, "I believe witnesses have very often been called, that have declared they have been perjured in other

(*p*) 2 Wils. 341.

(*q*) See that case and the note to it,

1 Smith, L. C. 310, 5th Ed.

(*r*) 1 Mod. 282.

(*s*) 10 Ho. St. Tr. 1079, 1185, 6.

(*t*) 19 Ho. St. Tr. 283, 632, 633.

instances; but I will never admit or suffer a person that will say they have been perjured in another affair, and I knew it before they were sent for. When she (*i. e.*, the witness) swears true I can not tell; but that she has sworn false once, I must know." On counsel observing that in the case of subornation of perjury such were admitted every day, Legge, B., answered "they are admitted, but it goes so much to their credit." The recorder (Moreton) expressed a similar opinion, and referred to the case of Titus Oates. It is very difficult indeed to see a distinction in this respect between perjury and subornation—why an avowal of perjury on a former occasion, should be an objection to competency in the one case, and only to credit in the other. The maxim in question was cited by Lord Mansfield as a maxim of the civil law, in *Walton v Shelley*, (*u*) in 1786, which case was afterwards overruled. (*v*) It has likewise been referred to in some other cases; (*w*) but the decisions in such of them as can be supported, would stand very well without it—most, if not all, proceeding on the unimpeachable principle that a man shall not be allowed to take advantage of his own guilt, wrong, or fraud. (*x*)

**546.** The modern authorities completely negative the existence of any such rule, so far as witnesses are concerned. It is now undoubted law that a witness although not always bound to answer them, may be asked questions tending to criminate, injure, or degrade him. (*y*) So, it is the constant practice in criminal cases to receive the evidence of accomplices, who depose

(*u*) 1 T. R. 296, 300.

(*v*) *Jordaine v. Lashbrook*, 7 T. R. 601.

(*w*) *Gibson v. Minet*, 1 H. Bl. 569, 597, per Gould, J., *Findon v. Parker*, 7 Jurist, 903, 907; *Steadman v. Du-*

*hamel*, 1 C. B. 888, 889; *Mann v Swann*, 14 Johns. 269, 273; U. S. v *Leffler*, 11 Peters, 86 & 94.

(*x*) *Infra*.

(*y*) Bk. 2, pt. 1, ch. 1.

to their own guilt as well as to that of the accused ; and it is not even indispensable, although customary and advisable, that some material part of the story told by the accomplice should be corroborated by untainted evidence. (z) The cases of Titus Oates and Elizabeth Canning, the chief authorities in favor of the maxim, were expressly overruled by the Court of King's Bench in *R. v. Teal*. (a) That was a prosecution against Toomas Teal, Hannah S., and others, for conspiring falsely to charge the prosecutor with being the father of a bastard child of Hannah S. A *nolle prosequi* having been entered as to Hannah S., she was examined as a witness to prove that she had, at the instigation of the defendant Teal, forsworn herself in deposing that the prosecutor was father of the child. A new trial being moved for on the ground that she was an incompetent witness, the cases of Oates and Canning were relied on ; and it was also argued, that a person who admits himself to be an infidel is disqualified from giving evidence. The court, however, took a different view ; and Lord Ellenborough said : " An infidel can not admit the obligation of an oath at all, and can not therefore give evidence under the sanction of it. But though a person may be proved on his own showing, or by other evidence, to have forsworn himself as to a particular fact, it does not follow that he can never afterwards feel the obligation of an oath ; though it may be a good reason for the jury, if satisfied that he had sworn falsely on the particular point, to discredit his evidence altogether. But still that would be no warrant for the rejection of the evidence by the judge, it only goes to the credit of the witness, on which

(z) Bk. 2, pt. 1, ch. 2, § 171.

(a) 11 East, 307.

the jury are to decide." In the subsequent case also of *Rands v. Thomas*, (*b*) which was an action for goods furnished to a ship, the plaintiff, in order to show the defendant to be a part-owner, proved that his name was upon the register as such, and also that, after the time when the goods were furnished, he had executed a bill of sale of his share to one Cooke; on whose oath the register was obtained, and he was stated in it to be a part-owner. The defendant proposed to call Cooke, to prove that he had inserted the defendant's name in the register without his privity or consent; on which it was objected, that Cooke could not contradict the oath he had taken at the time of the registry. *Graham, B.*, acceded to this view, and rejected the evidence; but the court set aside the verdict, on the authority of *R. v. Teal*, holding that the objection went only to the credit of the witness. So it is competent for a defendant who is sued on a contract, to plead and prove that, as between him and the plaintiff, such contract was illegal or immoral; (*c*) but not that it was merely fraudulent. (*d*) For although a man may, in a court of justice, acknowledge his own wrong or fraud, it is a principle of law that he shall not be allowed to take advantage of it (*e*)—"Nullus commodum capere potest de injuria sua propria." (*f*)<sup>1</sup>

(*b*) 5 M. & S. 244.

(*c*) *Holman v. Johnson*, Cowp, 341, 343.

(*d*) *Jones v. Yates*, 9 B. & C. 532, 538.

(*e*) 1 Blackst. Comm. 443; Co. Litt. 148b; 2 Inst. 713; *Montefiori v. Montefiori*, 1 W. Bl. 363; *Doe d. Roberts v. Roberts*, 2 B. & A. 367;

*Doe d. Bryan v. Bancks*, 4 Id. 401, 409, per Best, J.; *Daly v. Thompson*, 10 M. & W. 309; *Findon v. Parker*, 11 Id. 675, 681; *Murray v. Mann*, 2 Exch. 538.

(*f*) Co. Litt. 148b; Jenk. Cent. 4, Cas. 5. See Dig. lib. 50, tit. 17, l. 134.

<sup>1</sup> No one can take advantage of his own wrong.



## SECTION III.

## SELF-DISSERVING STATEMENTS IN CRIMINAL CASES.

547. We come lastly to self-disserving statements in criminal cases; or, as they are most usually termed, "confessions." In treating this subject, we propose to consider,

1. Estoppels in criminal cases.
2. The admissibility and effect of extra-judicial self-criminative statements.
3. Infirmative hypotheses affecting self-criminative evidence.

## SUB-SECTION I.

## ESTOPPELS IN CRIMINAL CASES.

|                                      | PARAGRAPH |
|--------------------------------------|-----------|
| Estoppel in criminal cases . . . . . | 548       |
| 1. Judicial confession . . . . .     | 548       |
| 2. Pleading . . . . .                | 549       |
| 3. Collateral matters . . . . .      | 550       |

548. In this branch of the law there are, for obviously just reasons, few estoppels. The first and most important is the estoppel by judicial confession. It may be taken as a rule of universal jurisprudence, that a confession of guilt, made by an accused person to a judicial tribunal having jurisdiction to condemn or acquit him, is sufficient to found a conviction, (*g*)

(*g*) 1 Greenl. Ev. § 216, 7th Ed. de Prob. Concl. 344, 345; Ayliffe  
 Tayl. Ev. § 792, 4th Ed.; Dig. lib. 42, Parerg. Jur. Can. Angl. 545; 2 Hagg  
 tit. 2; Cod. lib. 7, tit. 59; Mascard, Cons. Rep. 315; 1 Ev. Poth. § 798.

even where it may be followed by sentence of death ; such confession being deliberately made, under the deepest solemnities,<sup>1</sup> oftentimes with the advice of counsel, and always under the protecting caution and oversight of the judge. (*h*)<sup>1</sup> “*Confessus in judicio pro judicato habetur, et quodammodo sua sententia damnatur.*” (*i*) “*Confessio facta in judicio, omni probatione major est.*” (*j*)<sup>2</sup> “*Confessio in judicio, est plena probatio.*” (*k*) Still, if the confession appears incredible, or any illegal inducement to confess has been held out to the accused, or if he appears to have any object in making a false confession, or if the confession appears to be made under any sort of delusion, or through fear and simplicity, (*l*) the court ought not to receive it. So, if the offense charged is one of the class denominated “*facti permanentis*,” and no other indication of a *corpus delicti* can be found. (*m*) The numerous instances which have occurred of the falsity of confessions, judicial as well as extra-judicial, (*n*) traces of which are visible very early in our legal history, (*o*) fully justify this course. In ordinary practice a plea of guilty is never recorded by English judges, at least in serious cases, without first solemnly warning the accused, that such plea will not entitle

(*h*) Greenl. in loc. cit.

(*l*) Finch's Law, 29 ; Ayliffe, Parerg.

(*i*) 11 Co. 35a. Acc. Cod. lib. 7, tit. 59 ; Dig. lib. 42, tit. 2, l. 1 ; Id. lib. 9, tit. 2, l. 25, § 2.

Jur. Can. Angl. 545.

(*j*) Jenk. Cent. 2, Cas. 99.

(*m*) See *supra*, ch. 2, sect. 3, sub-sect. 2, § 441.

(*k*) Jenk. Cent. 3, Cas. 73.

(*n*) See *infra*, sub-sect. 3.

(*o*) 27 Ass. pl. 40 ; 22 Ass. pl. 71.

<sup>1</sup> See *ante*, notes, as to Confessions.

<sup>2</sup> A man confessing a judgment is considered in the same light as if judgment had been given against him, and, as it were, is condemned by his own sentence. A confession made in judgment (or a confession of a judgment) is superior to all proof.

him either to mercy or a mitigated sentence, and freely offering him leave to retract it and plead not guilty. (*p*) For it is important to observe, that the plea of not guilty by an accused person, is not to be understood as a moral asseveration of his innocence of the offense with which he is charged; it means no more than he avails himself of the undoubted right vested in him by law, of calling on the prosecution to prove him guilty of that offense.

549. 2. An accused person must plead the different kinds of pleas in their regular order—by pleading in bar he loses his right to plead in abatement, &c. (*q*)

550. 3. An accused person may be estopped by various collateral matter which do not appear on record. Thus he can not challenge a juror after he has been sworn, (*r*) unless it be for cause arising afterwards. (*s*) If he challenges a juror for cause, he must show all his causes together; (*t*) and on a trial for high treason, if he means to object to a witness, that he is misdescribed in the list of witnesses delivered under the 7 Ann. c. 21, and 6 Geo. 4, c. 50, he must take the objection on the voir dire; for it comes too late after the witness has been sworn in chief. (*u*) In the case of *R. v. Frost*, (*v*) which was an indictment for high treason, where the list of witnesses required by those statutes was not delivered in the manner therein prescribed, *i. e.*, simultaneously with the copy of the indictment and jury panel; it was held, on a case reserved, by nine judges against six, that the objection came too late, after the jury had been sworn and the indictment opened to them.

(*p*) 2 Hale, P. C. 225.

(*s*) Hob. 235.

(*q*) 2 Hale, P. C. 175; Cook's case,

(*t*) 2 Hale, P. C. 274.

5 Ho. St. Tr. 1143.

(*u*) *R. v. Frost*, 9 C. & P. 129, 183.

(*r*) 2 Hale, P. C. 293.

(*v*) 9 C. & P. 162 and 187.

<sup>1</sup> Wharton (on Criminal Law, § 751a) makes four classes of

## SUB-SECTION II.

THE ADMISSIBILITY AND EFFECT OF EXTRA-JUDICIAL  
SELF-CRIMINATIVE STATEMENTS.

|   | PARAGRAPH |
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| Admissibility of extra-judicial self-criminative statements . . . . . | 551       |
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| Effect of when received . . . . .                                     | 552       |
| Not conclusive . . . . .  | 552       |
| If believed sufficient without other evidence . . . . .               | 553       |
| Caution . . . . .   | 554       |

**551.** Self-disserving evidence it not always receivable in criminal cases as it is in civil. There is this condition precedent to its admissibility, that the party against whom it is adduced must have supplied it voluntarily, or at least freely. It is an established principle of English law, that every confession or criminative statement ought to be rejected, which has been extracted by physical torture, coercion, or duress of imprisonment; or which has been made after any inducement to confess has been held out to the accused, by, or with the sanction, express or implied, of any person having lawful authority, judicial or otherwise, over the charge against him, or over his person as connected with that charge. But in order to have this effect, the inducement thus held out, must be in the nature of a promise of favor or threat of punishment: *i. e.*, it must be calculated to convey to

estoppels in criminal law, viz., estoppel by judgment, by consent, by laches, and by connivance. As a rule, the burden of setting up an estoppel by consent, as a defense, is on the defendant. *Welsh v. State*, 11 Tex. 368; *State v. Whittier*, 21 Me. 368.

the mind of the accused, that his condition so far as it may be affected by the charge made against him, will be rendered better or worse by his consenting or refusing to confess. If, therefore, it appears that the accused was urged to speak the truth on moral grounds only, (x) the confession or criminative statement will be receivable; as it also will be, when the supposed influence of an illegal inducement to confess, may fairly be presumed to have been dissipated before the confession, by a warning from a person in authority, not to pay any attention to it. (y) The cases on the subject of what is an illegal inducement to confess are very numerous, and far from consistent with each other; (z) and there can be little doubt that the salutary rule which excludes confessions unlawfully obtained, has been applied to the rejection of many not coming within its principle. (a) All questions relating to the admissibility of extra-judicial confessorial statements are of course to be decided by the judge. Where, on a confession being offered in evidence, it appeared that an illegal inducement to confess had been held out, but the answers of the witnesses were confused and contradictory, as to whether that was before or after the confession, Parke, B., rejected it; saying, that the onus of proving that the confession was not made in consequence of an improper inducement, lay on the prosecution; and as it was impossible to collect from the answers of the

(x) See *R. v. Jarvis*, L. Rep., 1 C. C. 96; *R. v. Reeve*, Id. 362; *R. v. Gilham*, 1 Mo. C. C. 186; *R. v. Wild*, Id. 452.

(y) The 11 & 12 Vict. c. 42, s. 18, gives a form of caution, to be given by justices of the peace to persons brought before them charged with offenses. See also 18 & 19 Vict. c. 126, s. 3.

(z) A large number are collected in Arch. Crim. Plead. 198 *et seq.*, 15th Ed., and Rose. Crim. Evld. 39 *et seq.*, 6th Ed.

(a) See per Kelly, L. C. B. R. v. Reeve, L. Rep., 1 C. C. 362, 363; Tayl. Ev. § 766, 4th Ed.; 1 Phil. Ev. 408, 10th Ed.; *R. v. Baldry*, 2 Den. C. C. 430; *R. v. Moore*, Id. 522.

witness whether such was the case or not, the confession could not be received. (*b*)

**552.** With respect to the effect of extra-judicial confessions or statements when received, the rule is clear, that, unless otherwise directed by statute, no such confession or statement, whether plenary, or not plenary, whether made before a justice of the peace, or other tribunal having only an inquisitorial jurisdiction in the matter; or made by deed, or matter in pais; either amounts to an estoppel, or has any conclusive effect against an accused person, or is entitled to any weight beyond that which the jury in their conscience assign to it.

**553.** The necessity for clear and unequivocal proof of a corpus delicti, (*c*) joined to the desire so strongly evinced by our law, to protect parties from being unfairly prejudiced by false or hasty statements, gave rise to the doubt, whether a conviction can be supported on the mere extra-judicial self-criminative statement of an accused person. (*d*) Modern authorities incline to the affirmative. (*e*) Still such a principle should be acted on with great caution; for the numerous cases in which persons have wrongly accused themselves, or wrongly acknowledged themselves guilty of crimes, ought to render tribunals very careful of inflicting punishment, when the only proof of crime rests on the statement of the supposed criminal. On capital charges, and charges of murder

(*b*) *R. v. Warringham*, 15 Jur. 318; 2 Den. C. C. 430, 447, note.

(*c*) See *supra*, ch. 2, sect. 3, sub. sect. 2, § 441.

(*d*) Matth. de Prob. cap. 1, u. 7; *R. v. Eldridge*, R. & R. 440; *R. v. White*, Id. 508.

(*e*) *R. v. Falkner*, R. & R. 481; *R.*

*v. Tippet*, Id. 509; *R. v. Wheeling*, 1 Leach, C. L. 311, note. In the United States considerable difference of opinion seems to prevail on this subject. See 1 Greenf. Evid. § 217, 7th Ed.; Wharton, Americ. Crim. Law, 313, 4d Ed.; Burrill, Circ. Evid. 498.

especially, a double degree of caution is requisite—the truth of the statement should be carefully sifted, and every effort made to obtain evidence to confirm or disprove the *corpus delicti*. These considerations apply with increased force when a confession is not plenary.<sup>1</sup>

<sup>1</sup> See the learned and valuable treatise of Judge Appleton (on Evidence, Chapter XI.; Hearsay Evidence; and Confessions or Admissions of the Party).

## SUB-SECTION III.

## INFIRMATIVE HYPOTHESES AFFECTING SELF-CRIMINATIVE EVIDENCE.

|   | PARAGRAPH |
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| Infirmative hypotheses affecting self-criminative evidence . . . . .                  | 554       |
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554. The infirmative hypotheses affecting self-criminative evidence deserve the deepest and most anxious attention. The professors of the civil law, on the revival of its study in Europe, attributed a pecu-



liar virtue to the confessions of parties. It was pronounced a species of proof so clear, excellent, and transcendent a nature, as to admit of no proof to the contrary. (*f*) In a great degree connected with this notion, was the practice of torturing suspected persons to extract confessions; (*g*)—which, to the disgrace of the civil law in all its modifications, (*h*) and likewise of the canon law, (*i*) so long prevailed on the continent. The absurdity, to say nothing of the injustice and cruelty of that practice, has been too ably and too frequently exposed to require notice here (*k*)

(*f*) "Mulum à doctoribus rei confessio. Probatio dicitur liquidissima, principalissima, illustrissima, adeò ut non admittat probationem in contrarium." Matthæus de Prob. cap. 1, u. 6. They also called it "probatio probatissima." Bonnier, *Traité des Preuves*, § 241. It would however be most unjust to charge this absurdity on the Roman law itself, which in express terms lays down: "Si quis ultrò de maleficio fateatur, non semper ei fides habenda sit: nonnunquam enim aut metù, aut quâ aliâ de cansâ in se confitentur." *Dig. lib. 48, tit. 18, l. 1, § 27*, where a strong instance of false confession is recorded. So in another place. "Si quis hominem vivum falso confiteatur occidisse, et postea paratus sit ostendere hominem vivum esse: Julianus scribit, cessare Aquiliam; quamvis confessus sit se occidisse; hoc enim solum remittere actori confessoriam actionem, ne necesse habeat docere, eum occidisse; cæterum occisum esse hominem à quocunque oportet." *Dig. lib. 9, tit. 2, l. 23, s. 11*. "Hoc apertiùs est circa vulneratum hominem: nam si confessus sit vulnerasse, nec sit vulneratus, æstimationem cujus vulneris faciemus? vel ad quod tempus recurremus?" *Id. l. 24*. "Proinde si occisus quidem non sit,

mortuus autem sit, magis est, ut non teneatur in mortuo, licet fassus sit." *Id. l. 25*. See also *Dig. lib. 48, tit. 18, l. 1, § 17*; *tit. 19, l. 27*; *lib. 11, tit. 1, l. 11, §§ 8 et seq.*; *lib. 42, tit. 2*.

(*g*) Bonnier, *Traité des Preuves*, § 647.

(*h*) *Introd. pt. 2, §§ 69, 70, note (f)*.

(*i*) *Decret. Gratian, Pars 2, Causa 5, Quæst. 5, cap. 4*; *Constit. Clement. lib. 6, tit. 5, cap. 1, § 1*.

(*k*) The civilians professed to found all their labors on the Roman law. We have seen in note (*f*) how grievously they departed from it in one instance, and others might be adduced. On the subject of torture indeed they copied their original more faithfully; and yet it would be difficult to find a stronger exposition of the absurdity and danger of the practice than in the following language of the Digest itself. "Quæstioni fidem non semper, nec tamen nunquam habendam, Constitutionibus declaratur: etenim res est fragilis, et periculosa, et quæ veritatem fallat. Nam plerique patientiâ sive duritia tormentorum ita tormenta contemnunt, ut ex rimi eis veritas nullo modo possit: alii tanta, sunt impatientiâ, ut (in) quovis mentiri, quam pati tormenta velint: ita fit ut

—its almost universal abandonment in our days is perhaps its severest condemnation. The fallacy also of attributing a conclusive effect to confessorial evidence, was detected by the intelligence of the later times, (*l*) and has been abundantly confirmed by experience. Why must a confession of guilt necessarily be true? Because, it is argued, a person can have no object in making a false confessorial statement, the effect of which will be to interfere with his interest by subjecting him to disgrace and punishment; and consequently the first law of nature—self-preservation—may be trusted as a sufficient guarantee for the truth of any such statement. This reasoning is, however, more plausible than sound. Conceding that every man will act as he deems best for his own interest; still (besides the possibility of his misconceiving facts or law), he may not only be most completely mistaken as to what constitutes his true interest, but it is an obvious corollary from the proposition itself, that when the human mind is solicited by conflicting interests the weaker will give place to the stronger: and consequently, that a false confessorial statement may be expected, when the party sees a motive sufficient, in his judgment, to outweigh the inconveniences which will accrue to him from making it. Now, while the punishment denounced by law against offenses is visible to all mankind, not only are the motives which induce a person to avow delinquency, confined to his

etiam vario modo fateantur, ut non tantum se, verum etiam alios commin-entur." Dig. lib. 48, tit. 18, l. 1, § 23. Notwithstanding all this, the compilers of the Digest retained the practice of torture in the Roman law, and the cases in which it might be resorted to are carefully pointed out in the same

title, and stand side by side with the the above passage.

(*l*) The later civilians were fully sensible of this fallacy. See Mascard de Prob. Quært. 7; Matthæus de Prob. cap. 1, nn. 4 and 6; 1 Hagg Cons. Rep. 304.

own breast ; but those who hear the confessional statement, often know little or nothing of the confessionalist, far less of the innumerable links by which he may be bound to others who do not appear on the judicial stage. The force of these considerations will be better appreciated, when we come to examine separately the principal motives to false confessions ; (*m*) but first, as connected with the whole subject, must be noted a marked distinction between our judicature and that of most foreign nations.

555. In the mediæval tribunals of the civil and canon laws, the inquisitorial principle was essentially dominant. And this has so far survived, that in many continental tribunals at the present day, every criminal trial commences with a rigorous interrogation of the accused, by the judge or other presiding officer. Nor is this interrogation usually conducted with fairness towards the accused. Facts are garbled or misrepresented, questions assuming his guilt are not only put, but pressed and repeated in various shapes ; and hardly any means are left untried to compel him, either directly or by implication, to avow something to his prejudice. This is no chimerical danger. By artful questioning and working on their feelings, weak-minded individuals can be made to confess or impliedly admit almost anything ; and to resist continued importunities to acknowledge even falsehood, requires a mind of more than average firmness. (*n*) The common law of England

(*m*) *Infra*.

(*n*) Look at the trial, if *trial* it can be called, of C. Silanus before the Emperor Tiberius. " Multa aggregabantur etiam insontibus periculosa . . . non temperante Tiberio quin premeret voce, vultu, eo quod ipse creberrime interrogabat ; neque refellere aut eleudere dabatur ; ac

sæpe etiam confitendum erat, ne frustra quæsisisset." Tacitus, *Annal.* lib. 3, cap. 67. A good instance is to be found in the trial of the Duc de Praslin, in 1847, which, having taken place before the Chamber of Peers, at that time the highest tribunal in France, may fairly be supposed to have been conducted with the strictest regularity.

proceeds in a way quite the reverse of all this,—holding that the onus of proving the guilt of the accused lies on the accuser, and that no person is bound to criminate himself; according to the maxim, “*Nemo tenetur seipsum prodere.*” (*o*) It has therefore always abstained from physical torture,—“*Cruciatus legibus invisus;*” (*p*)—and taken great care, perhaps too great

The duke was charged with the murder of his wife, and the following is part of his interrogation by the president :

“Was she (the deceased) not stretched upon the floor where you had struck her for the last time?”—“Why do you ask me such a question?”

Then follow these questions and answers.

“You must have experienced a most distressing moment when you saw, upon entering your chamber, that you were covered with the blood which you had just shed, and which you were obliged to wash off?”—“Those marks of blood have been altogether misinterpreted. I did not wish to appear before my children with the blood of their mother upon me.”

“You are very wretched to have committed this crime?”—(The accused makes no answer, but appears absorbed.)

“Have you not received bad advice, which impelled you to this crime?”—“I have received no advice. People do not give advice on such a subject.”

“Are you not devoured with remorse, and would it not be a sort of solace to you to have told the truth?”—“Strength completely fails me to-day.”

“You are constantly talking of your weakness. I have just now asked you to answer me simply ‘yes,’ or ‘no.’”—

“If anybody would feel my pulse, he might judge of my weakness.”

“Yet you have had just now sufficient strength to answer a great many questions in detail. You have not wanted strength for that.” (The accused makes no reply.)

“Your silence answers for you that you are guilty.”—“You have come here with a conviction that I am guilty, and I can not change it.”

“You can change it if you give us any reason to believe the contrary; if you will give any explanation of appearances that are inexplicable upon any other supposition than that of your guilt.”—“I do not believe I can change that conviction on your mind.”

“Why do you believe that you can not change that conviction?”—(The accused, after a short silence, said that he had not strength to continue.)

“When you committed this frightful crime did you think of your children?”—“As to the crime, I have not committed it; as to my children, they are the subject of my constant thoughts.”

“Do you venture to affirm that you have not committed this crime?”—(The accused, putting his head between his hands, remained silent for some moments, and then said) “I can not answer such a question.” (11 Jur. 365, Part 2.)

(*o*) 3 Bulst. 50. See also 14 & 15 Vict. c. 99, s. 3.

(*p*) Lofft, M. 434. Whenever tor

care, to prevent suspected persons from being terrified, coaxed, cajoled, or entrapped into criminative statements; (*q*) and it not only prohibits judicial interrogation in the first instance, but if the evidence against the accused fails in establishing a *prima facie* case against him, it will not even call on him for his defense. As, however, the introduction of judicial interrogation into this country, has been warmly advocated by able jurists, (*r*) we propose to examine briefly the claims of the conflicting systems.

**556.** In favor of judicial interrogation it is argued, first, that it is the duty of courts of justice to use all available means to get at the truth of the matters in question before them; and as the accused must necessarily best know his own guilt or innocence, he is naturally the fittest person to be interrogated on that subject; and indeed that in many cases, often of the most serious nature, it would be impossible, without his own testimony, to prove crime against the accused. Secondly, that the rule which excuses a man from criminating himself, is a protection to none but the evil-disposed; for not only have innocent persons nothing to dread from interrogation, however severe, but the more closely the interrogation is followed up, the more their innocence will become apparent.

ture has been applied in England, it was in virtue of some real or imaginary prerogative of the crown; for it could not be awarded in the ordinary course of law. The "peine, or prisonne, forte et dure" may seem an exception to this, but in truth is not; for the object of it was to compel the accused to plead, *i.e.*, say whether he was guilty or not, in order that the court might know whether they ought to proceed to sentence, or empanel a jury to try him.

(*q*) See *supra*, sub-sect. 2, § 551. We speak of the ordinary practice of our tribunals; not of the state trials of former times, where every rule seems to have been reversed.

(*r*) Particularly Bentham. See his *Judicial Evidence*, Book 2, chap. 9; Book 5, chap. 7; Book 9, part 4, chaps. 2, 3, 4; and part 5, chap. 3, &c. See also a paper by Mr. Fitzjames Stephen; *Papers of the Juridical Society*, vol. i. p. 456.

And, lastly, that in declining to extract self-disserving statements from the accused himself, while it receives without scruple from the mouths of witnesses, similar statements which he has made to them, the English law violates its own fundamental rule, which requires the best evidence to be given.

**557.** Before considering what may be directly urged on the other side, it is essential to point attention to an important circumstance commonly lost sight of. In the English system, as in every other, the indictment, information, act of accusation, or whatever else it may be called, is a general interrogation of the accused to answer the matters charged; and every material piece of evidence adduced against him is a question to him, whereby he is required either to prove that the fact deposed to is false, or explain it consistently with his innocence. Any evidence or explanation he can give is not only receivable, but anxiously looked for by the court and jury; and, in practice, his non-explanation of apparently criminating circumstances, always tells most strongly against a prisoner. What our law prohibits is the special interrogation of the accused—the converting him, whether willing or not, into a witness against himself; assuming his guilt before proof, and subjecting him to an interrogation conducted on that hypothesis. And here a question naturally presents itself—supposing the interrogation of accused persons advisable, by whom is it to be performed? There seem but two alternatives—the accuser or the court; and, if the extraction of truth be the sole object in view, why is not the accused to be interrogated on oath like other witnesses? But this and the subjecting the accused to the interrogation of the accuser, although sometimes advocated, is not the continental

practice, where the interrogation of the accused is the act of the tribunal. And here a difficulty presents itself at the outset—how is an abuse of power in this respect to be rectified? Improper questions put to a witness by a party or his counsel, may be objected to by the other side, and the judge determines whether the objection is well founded. But when the judge is the delinquent who is to call him to order? Decency and the rules of practice alike prohibit counsel from taking exception to questions put by the bench; and, indeed, the doing so would be appealing to a man against himself.

558. But to test this important question by broader principles. First, then, the functions of tribunals appointed to determine causes are primarily and essentially judicial, not inquisitorial. The tribunal is to judge and decide; to supply the proofs—the materials for decision—belongs in general to the litigant parties: though the inquisitorial principle is recognized thus far, that the tribunal is empowered to extract facts from the instruments of evidence adduced, and in some cases to compel the production of others which have been withheld. In the next place, the proposition that it is the duty of courts of justice, to use all available means to get at the truth of the matters in question before them, must be understood with these limitations; first, that those means be such as are likely to extract the truth in the majority of cases; and, secondly, that they be not such as would give birth to collateral evils, outweighing the benefit of any truth they might extract. (*s*) Admitting, therefore, that the special interrogation of accused persons might in some cases extract truth which otherwise

(*s*) See *Intro.* pt. 2.

would remain undiscovered (indeed the same may be said of torture, duress of imprisonment, or any other violent means adopted to compel confession); the law is fully justified in rejecting the use of such an engine, if on the whole prejudicial to the administration of justice. Now that sort of interrogation, even when conducted with the most honest intention, must, in order to be effective, assume the shape of cross-examination, and consequently involve the judge in an intellectual contest with the accused,—a contest unseemly in itself, dangerous to the impartiality of the judge, and calculated to detract from the moral weight of the condemnation of the accused, though ever so guilty. In gladiatorial conflicts of this kind, the practiced criminal has a much better chance of victory than an innocent person, embarrassed by the novelty and peril of his situation; whose honesty would probably prevent his attempting a suppression of truth, however much to his prejudice; and whose inexperience in the ways of crime, were he in a moment of terror to resort to it, would insure his detection and ruin. But where the judge is dishonest or prejudiced, the danger increases immeasurably. The screw afforded by judicial interrogation, would then supply a ready mode of compelling obnoxious persons, under penalty of condemnation for silence, to disclose their most private affairs; and corrupt governments would be induced, in order to get at the secrets of political enemies, or sweep them away by penal condemnation, to place unprincipled men on the bench, thus polluting justice at its source. In short, judicial interrogation, however plausible in theory, would be found in practice a moral torture; scarcely less dangerous than the physical torture of former



times, and, like it, unworthy of a place in the jurisprudence of an enlightened country.

**559.** To return to the subject of false self-criminative statements. It is sometimes impossible to ascertain the motive which has led to a confession indisputably false. In November, 1580, a man was convicted and executed on his own confession, for the murder, near Paris, of a widow who was missing at the time, but who two years afterwards returned to her home. (*t*) And the celebrated case of Joan Parry and her two sons,—who were executed in this country in the seventeenth century, for the murder of a man named Harrison, who reappeared some years afterwards,—affords another instance. That conviction proceeded chiefly on the confession of one of the accused; whether the result of insanity, fear, improper inducements to confess, or the desire of revenge against his fellow-prisoner, it is difficult to determine. (*u*)

**560.** All false self-criminative statements are divisible into two classes—those which are the result of mistake on the part of the confessionalist, and those which are made by him in expectation of benefit. And the former are two-fold—mistakes of fact and mistakes of law.

**561.** First, of mistakes of fact. A man may believe himself guilty of a crime, either when none has been committed, or where a crime has been committed, but by another person. Mental aberration is the obvious origin of many such confessions. But the actors in a tragedy may be deceived by surrounding

(*t*) Bonnier, *Traité des Preuves*, § 256. This seems the case referred to in Matthæus de Probat. cap. 1, n. 4.

(*u*) 14 Ho. St. Tr. 1312. See also

the false confession by John Sharpe of the murder of Catharine Elmes, Ann Reg. for 1833, Chron. 74.

circumstances, as well as the spectators. A case has been cited in a former part of this work, (*x*) where a girl died in convulsions, while her father was in the act of chastising her very severely for theft, and he fully believed that she died of the beating; but it afterwards turned out that she had taken poison on finding her crime detected. If the surgeon had not made a post-mortem examination, that man would have been indicted for homicide, and most probably would have pleaded guilty to manslaughter at least. Instances frequently occur, where death from previously existing disease, follows shortly after the unjustifiable infliction of wounds or blows, believed by the guilty party to have been fatal. (*y*) So, a man may mistake for a robber, a corpse which has been secretly conveyed into his chamber, may inflict blows or wounds on it, and discovering the mistake, consider himself guilty of homicide. (*z*) A habitual thief may, by confounding one of his exploits with another, suppose and admit himself guilty of an offense in which he really bore no part; (*a*) although it must be acknowledged, that justice is not likely to suffer much from this. Under the present head may be classed some of the confessions of witchcraft that will be noticed presently. (*b*)

**562.** 2. Next, as to mistakes of law. It should never be forgotten that all confessions avowing delinquency in general terms are, more or less, confessions *juris*; and this will in a great degree explain, what to unreflecting minds seems so anomalous, the caution exercised by British judges in receiving a plea of

(*x*) *Supra*, cn. 2, § 447; Beck's Med. Jur. 766.

(*y*) See Taylor's Med. Jur. chap. 29, 7th Ed.

(*z*) See the story of the Little Hunch-

back in the Arabian Nights' Entertainments.

(*a*) 3 Benth. Jud. Ev. 157, 158.

(*b*) *Infra*.

guilty. (c) The same observation of course applies to all extra-judicial statements which are not mere relations of facts. And here one great cause of error is ignorance of the meaning of forensic terms; (d) especially where the accused, conscious of moral, is unaware that he has not incurred legal guilt. Thus, a man really guilty of fraud or larceny, might plead guilty to a charge of robbery, through ignorance that, in legal signification, the latter means a taking of property accompanied with violence to the person, though it is popularly used to designate any act of barefaced dishonesty. This is a mistake which formerly might have cost a man his life: and to this hour a person really guilty of manslaughter might, through ignorance, plead guilty of the capital offense of murder. Again, the distinction between larceny and aggravated trespass is sometimes very slight; so that an ignorant man, conscious that he can not defend his right to property which he has taken, might plead guilty to a charge of larceny, where there had been no *animus furandi*.

563. In the other class of false self-criminative statements, the statement is known by the confessionalist to be false, and is made in expectation of some real or supposed benefit. It is obviously impossible to enumerate the motives which may sway the minds of men to make false statements of this kind. (e) First, many are made for ease, and to avoid vexation arising out of the charge; and in some of these cases the cause of the false statement is apparent, viz., when it is

(c) *Supra*, sub-sect. 1, § 548.

(d) 27 Ass. pl. 40. A woman was arraigned for having feloniously stolen some bread: who said that she did it by command of her husband. And the justices through pity would not take her acknowledgment, but took the en-

quest, by which it was found that she did it by coercion of her husband against her will, whereupon she went quit, &c.

(e) See Benth. Jud. Ev. Book 5, chap. 6, sects. 2 and 3.

made to escape torture, either physical or moral. (*f*) In others, it is less obvious. Weak or timorous persons, confounded at finding themselves in the power of the law ; or alarmed at the testimony of false witnesses, or the circumstantial evidence against them ; or distrustful of the honesty or capacity of their judges, hope by an avowal of guilt to obtain leniency at their hands. (*g*)

564. Moreover, an innocent man, accused or suspected of a crime, may deem himself exposed to an-

*f*) See *supra*, §§ 554 *et seq.*

(*g*) A striking instance of this is afforded by the case of the two Boorns, who were convicted in the Supreme Court of Vermont, in Bennington County, in September term, 1819, of the murder of Russell Colvin, May 10th 1812. It appeared that Colvin who was the brother-in-law of the prisoners, was a person of a weak and not perfectly sound mind ; that he was considered burdensome to the family of the prisoners, who were obliged to support him ; that on the day of his disappearance, being in a distant field, where the prisoners were at work, a violent quarrel broke out between them ; and that one of them struck him a severe blow on the back of the head with a club, which felled him to the ground. Some suspicions arose at that time, that he had been murdered ; which were increased by the finding of his hat in the same field a few months afterwards. These suspicions in process of time subsided ; but, in 1819, one of the neighbors having repeatedly dreamed of the murder, with great minuteness of circumstance, both in regard to the death and the concealment of the remains, the prisoners were vehemently accused, and generally believed guilty of the murder. Upon strict search, the pocket knife

of Colvin, and a button of his clothes, were found in an old open cellar in the same field, and in a hollow stump, not many rods from it, were discovered two nails and a number of bones, believed to be those of a man. Upon this evidence, together with their deliberate confession of the fact of the murder and concealment of the body in those places, they were convicted and sentenced to die. On the same day they applied to the legislature for a commutation of the sentence of death to that of perpetual imprisonment ; which, as to one of them only, was granted. The confession being now withdrawn and contradicted, and a reward offered for the discovery of the missing man, he was found in New Jersey, and returned home in time to prevent the execution. He had fled for fear that they would kill him. The bones were those of some animal. They had been advised, by some misjudging friends, that as they would certainly be convicted upon the circumstances proved, their only chance for life was by commutation of punishment, and that this depended on their making a penitential confession, and thereupon obtaining a recommendation to mercy. 1 Greenl. Ev. § 214, note (2), 7th Ed.

noyance at the hands of some person, to whom his suffering as for that crime would be acceptable. (*h*) To this class belong those cases, where the evidence necessary to establish the innocence of the confessionalist, would be the means of disclosing transactions which it was the interest of many to conceal; or would bring before the world, in the character of a criminal, some eminent individual, whose reward for a false acknowledgment of guilt would be great, and whose vengeance for exposure might be terrible. Under circumstances like these, the accused is induced by threats or bribes to suppress his defense, and own himself the author of the crime imputed to him.

565. But false self-criminative statements also arise from objects wholly collateral, relating either to the party himself or to others. 1. With respect to the first of these. 1. A false confession of an offense, may be made with the view of stifling inquiry into other matters, as for instance, some more serious offense of which the confessionalist is as yet unsuspected. (*i*)

566. 2. The most fantastic shape of this anomaly, springs from the state of mental unsoundness which is known by the name of *tædium vitæ*. (*k*) Several instances are to be found, where persons tired of life have falsely accused themselves of capital crimes, which were either purely fictitious, or were committed by others. (*l*) In such cases the maxim of the con-

(*h*) 3 Benth. Jud. Ev. 124.

(*i*) Id.

(*k*) See Bacon's Essay on Death; Dig. lib. 29, tit. 5, l. 1, § 23; Matth. de Crimin. ad lib. 48 Dig. tit. 16, cap. 1, n. 2.

(*l*) A Frenchman named Hubert was convicted, and executed, on a most circumstantial confession of his

having occasioned the great fire of London in 1666; "although," adds the historian, "neither the judges nor any present at the trial did believe him guilty, but that he was a poor distracted wretch, weary of life, and chose to part with it in that way." Continuation of Lord Clarendon's Life, 352, 353.

tinental lawyers, "nemo auditur perire volens," (*m*) may be applied with advantage.

567. 3. "In the relation between the sexes," says Bentham, when treating of the subject of false confessions, (*n*) "may be found the source of the most natural exemplifications of this, as of so many other eccentric flights. The female unmarried—punishment as for seduction hazarded, the imputation invited and submitted to, for the purpose of keeping off rivals, and reconciling parents to the alliance. The female married—the like imputation, even though unmerited, invited with a view to marriage, through divorce." And so sensible was the canon law of this country of the danger of false confessions from this source, that, as we have seen, it would not allow adultery to be proved (at least for the purpose of divorce a vinculo matrimonii), by the unsupported confession, judicial or extra-judicial, of the wife. (*o*)

568. 4. "Vanity," observes the jurist above quoted, (*p*) "without the aid of any other motive, has been known (the force of the moral sanction being in these cases divided against itself) to afford an interest, strong enough to engage a man to sink himself in the good opinion of one part of mankind, under the notion of raising himself in that of another. False confessions, from the same motive, are equally within the range of possibility, in regard to all acts regarded in opposite points of view by persons of different descriptions. I insulted such or such a man: I wrote such

(*m*) Bonnier, *Traité des Preuves*, §§ 256 and 257; D'Aguesseau (*Œuvres*), tom. 4, p. 186; 5 *Causes Célèbres*, 454, Ed. Richer; Matth. in loc. cit.

(*n*) 3 Benth. Jud. Ev. 116, 117.

(*o*) *Suprà*, § 441. And see the

Canons of 1597, cap. 6, and of 1604, cap. 105. Also the judgment of Sir William Scott in *Mortimer v. Mortimer*, 2 Hagg. Cons. Rep. 316; Gibs. Cod. Jur. Eccl. Angl. tit. 22, cap. 17 and Ought. Ordo Jud. tit. 213.

(*p*) 3 Benth. Jud. Ev. 117-18.

or such a party pamphlet, regarded by the ruling party as a libel, by mine as a meritorious exertion in the cause of truth : I wrote such or such a religious tract, defending opinions regarded as heretical by the Established Church, regarded as orthodox by my sect." "Quam multi," says one of the ablest of the later civilians, (*q*) "sunt gloriosi militis similes, qui triginta Sardos, sexaginta Macedones, centum Cilices uno die occidisse se gloriantur, atque etiam elphanto in India pugno perfregisse femur ; quos pœna potius quam commiseratione dignos dixerit nemo." False statements of this kind are sometimes the offspring of a morbid love of notoriety at any price. The motive that induced the adventurous youth to burn the temple of Ephesus, would surely have been strong enough to induce him to declare himself, however innocent, the author of the mischief, had it occurred accidentally.

**569.** 5. Several other instances may be found, of false confessions made with a view to some specific collateral end. (*r*) The Amalekite who falsely accused himself of having slain Saul, presents an early and authentic instance. (*s*) Soldiers engaged on foreign service, not unfrequently declare themselves guilty of having committed crimes at home, in order that, by being sent back to take their trial, they may escape from military duty. (*t*) Formerly, when transportation was looked upon by many of the lower orders as a boon rather than a punishment, offenses were occasionally committed in the hope of procuring the

(*q*) Matth. de Crimin. ad lib. 48, Dig. tit. 16, cap. 1, n. 3.

(*r*) Under this head comes the celebrated case of the slave Primitivus, who, to escape from his master, falsely accused himself and others of homo-

cide. Dig. lib. 48, tit. 18, l. 1, § 27.

(*s*) 2 Sam. 1.

(*t*) False confessions of *desertion* are so common, that a special clause (s. 38) respecting them is inserted in the annual mutiny acts.

supposed benefit; and it is not improbable that false confessions of offenses which had been really committed by others, were made with the same object.

**570. 2.** Hitherto we have been considering cases where the false confession is made with the view of benefiting the confessionalist himself. We now proceed to those in which other parties are involved. 1 The strongest illustrations of this, are where the person who makes the false confession is desirous of benefiting others; as, for instance, to save the life, fortune, or reputation of, or to avert suffering from a party whose interests are dearer to him than his own. (u) The less exalted motive of getting money, has sometimes had the same effect. (x)

(u) A singular instance of this is said to have taken place at Nuremberg, in 1787, where two women in great distress, in order to obtain for the children of one of them the provisions secured to orphans by the law of that country, falsely charged themselves with a capital crime. They were convicted; and one was executed, but the other died on the scaffold, through excitement and grief at witnessing the death of her friend. Case of Maria Schoning and Anna Harlin, *Causes Célèbres Etrangères*, vol. 1, p. 200, Paris, 1827. A case is also mentioned where, after a serious robbery had been committed, a man drew suspicion of it on himself, and when examined before a magistrate dropped hints amounting to a constructive admission of his guilt; in order that his brothers, who were the real criminals, might have time to escape; and afterwards on his trial, the previous object having been attained, proved himself innocent by a complete alibi. 1 *Chit. Crim. Law*, 81. It is well known that persons have sometimes destroyed them-

selves with the view of benefiting their families.

(x) "On assure qu'en Chine il y a des personnes qui avouent pour autrui des délits légers, afin de subir la punition au lieu et place du véritable coupable, qui les indemnise ensuite largement." Bonnier, *Traité des Preuves*, § 255: no authority cited. A modern traveler also, speaking of China, says, "Persons condemned to death may procure a substitute, who can be found on payment of a sum of money." Berncastle's *Voyage to China*, vol. 2, p. 167. See Norton, *Evid.* 115; Goodeve, *Evid.* 573, *ad id.* We give these extraordinary statements as we find them.

After the publication of the third edition, the author received a letter on this subject from Mr. T. T. Meadows, British Consul at Newchwang, Northern China, in which he says, "I feel desirous of removing adoubt expressed at the end of your note (z), p. 69c (3rd edition), respecting Chinese substitutes in criminal cases. In 1847, I published a volume of 'Desultory



**571.** 2. The desire of injuring others has occasionally led to the like consequence. Persons reckless of their own fate have sought to work the ruin of their enemies, by making false confessions of crimes and describing them as participators. We shall feel little surprise at this, when we recollect how often persons have inflicted grievous wounds on themselves, and even in some instances, it is said, committed suicide, in order to bring down suspicion of intended or actual murder on detested individuals. (y)

**572.** The anomaly of false confession, is not confined to cases where there might have been a criminal, or corpus delicti. Instances are to be found in the judicial histories of most countries, where persons with the certainty of incurring capital punishment, have acknowledged crimes now generally recognized as impossible. We allude chiefly to the prosecutions for witchcraft and visible communion with evil spirits, which in former ages, and especially in the seventeenth century, disgraced the tribunals of these realms.<sup>1</sup> Some of them

Notes on the Government and People of China; and the 13th note is headed, 'On personating criminals.' . . . I think that note will satisfy you that the personation of criminals, and that in cases involving capital punishment, is a well-known fact. I have, since writing that note in 1846, spent fifteen years in active service in this country, four of them as consul at Ningpo and Shanghai in Middle China, and now four as consul at this port, the most northerly of the empire; and I can assure you that the custom exists everywhere throughout it. The thing is

naturally not one very frequently done. But the term 'ting heung

**頂兇** *lit.* 'personate murderer,' is probably as familiar to those conversant with Chinese criminal proceedings and laws as is, for instance, the English term 'turn Queen's evidence' to those conversant with English criminal proceedings. The inducement is not always money. Juniors in families have been known to personate their criminal seniors, and even domestic slaves or serfs their guilty masters to whom they were attached."

(y) See bk. 2, pt. 2, § 206.

<sup>1</sup> The author subjoins, as specimens of the confessions of witchcraft in the seventeenth century, the examinations of two

present the extraordinary spectacle of individuals, not only freely (so far as the absence of physical torture constitutes freedom) confessing themselves guilty of

of the Essex witches in 1645, which purport to have been taken before Sir Harbottell Grimston, Knt. and Baronet, one of the members of the Hon. the House of Commons, and Sir Thomas Bowes, Knt., another of his majesty's justices of the peace for that county (4 How. State Trials, pp. 817, *et seq.*) :

"The examination of Anne Cate, alias Maidenhead, of Much Holland, in the county aforesaid, at Mannyntree, 9th May, 1645.

"This examinant saith that she hath four familiars, which she had from her mother about two-and-twenty years since; and that the names of the said imps are James, Prickeare, Robyn, and Sparrow; and that three of these imps are like mouses, and the fourth like a sparrow, which she called Sparrow; to whomsoever she sent the said imp Sparrow, it killed them presently; and that, first of all, she sent one of her three imps like mouses to nip the knee of one Robert Freeman, of Little Clacton, in the county of Essex aforesaid, whom the said imp did so lame that he died on that lameness within half a year after; that she sent the said imp Prickeare to kill the daughter of John Rawlins, of Much Holland aforesaid, who died accordingly within a short time after; and that she sent her said imp Prickeare to the house of one John Tillet, which did suddenly kill the said Tillet; that she sent her said imp Sparrow to kill the child of one George Parby, of Much Holland aforesaid, which child the said imp did presently kill; and that the offense this examinant took against the said George Parby, to kill his said child, was because the wife of the said Parby denied to give this examinant a pint of milk; that she sent her said imp Sparrow to the house of Samuel Ray, which, in a very short time, did kill the wife of the said Samuel; and that the cause of this examinant's malice against the said woman was, because she refused to pay to this examinant, twopence, which she challenged to be due to her; and that afterwards her said imp Sparrow killed the said child of the said Samuel Ray. And this examinant confesseth, that, as soon as she had received the said four imps from her said mother, the said imps spake to this examinant, and told her she must deny God and Christ; which this examinant did then assent to" (4 How. State Trials, p. 856).

these imaginary offenses, with the minutest details of time and place; but even charging themselves with having, through the demoniacal aid thus avowed, committed repeated murders and other heinous crimes. (z)

(z) See the cases of Mary Smith, 2 Ho. St. Tr. 1049; and of the Three Devan Witches, 8 Ho. St. Tr. 1017; the note to the case of the Bury St. Edmond's Witches, 6 Ho. St. Tr. 647; and the case of the Essex Witches, 4

The confession of Rebecca West, taken before the said justices, 21st March, 1645.

"This examinant saith, that, about a month since, Anne Leach, Elizabeth Gooding, Hellen Clark, Anne West, and this examinant, met altogether at the house of Elizabeth Clark, in Mannyntree, where they together spent some time in praying unto their familiars, and every one of them went to prayers; afterwards, some of them read in a book, the book being Elizabeth Clark's; and this examinant saith, that forthwith their familiars appeared, and every one of them made their several propositions to those familiars, what every one of them desired to have effected; that, first of all, the said Elizabeth Clark desired of her spirit that Mr. Edwards might be met withal, about the middle bridge, as he should be come riding from Eastberryhault, in Surrey; that his horse might be scared, and he thrown down, and never rise again; that the said Elizabeth Gooding desired of her spirit, that she might be avenged on Robert Tayler's horse, for that the said Robert suspected said Elizabeth Gooding for the killing of a horse of the said Robert, formerly; that the said Hellen Clark desired of her spirit, that she might be revenged on two hogs in Misley-street (being the place where the said Hellen lived), one of the hogs to die presently, and the other to be taken lame; that Anne Leach desired of her spirit that a cow might be taken lame of a man's living in Mannyntree, but the name of the man this examinant can not remember; that the said Anne West, this examinant's mother, desired of her spirit that she might be freed from all her enemies and have no trouble. And this examinant saith, that she desired of her spirit that she might be revenged on Prudence, the wife of Thomas Hart, and that the said Prudence might be taken lame on her right side. And, lastly, this examinant saith, that, having thus done, this examinant and the other five did appoint the next meeting to be at the said Elizabeth Gooding's house, and so departed all to their own houses" (Id. p. 840).

The cases in Scotland are even more monstrous than those in England; (*a*) but there is strong reason to believe that in most of them the confession was obtained by torture; (*b*) and the following sensible solution of the psychological phenomenon which they all present, is given by an eminent writer on the criminal law of the former country: (*c*)—"All these circumstances duly considered; the present misery: the long confinement; the small hope of acquittal; the risk of a new charge and prosecution; and the certain loss of all comfort and condition in society; there is not so much reason to wonder at the numerous convictions of witchcraft on the confessions of party. Add to these motives though of themselves sufficient, the influence of another as powerful perhaps, as any of them,—the unsound and crazy state of imagination in many of those unhappy victims themselves. In those times, when every person, even the most intelligent, was thoroughly persuaded of the truth of witchcraft, and of the possibility of acquiring supernatural powers, it is nowise unlikely that individuals would sometimes be found, who, either seeking to indulge malice, or stimulated by curiosity and an irregular imagination, did actually court and solicit a

Ho. St. Tr. 818, the latter especially. The confessions of Anne Cate, 4 Ho. St. Tr. 856, of Rebecca West, Id. 840, of Rose Hallybread, Id. 852, of Joyce Boanes, Id. 853, and of Rebecca Jones, Id. 854, are among the most remarkable; the two first of which are set out in the Appendix to this work, No. II.

(*a*) A large number of these are collected in Arnot's Collection of celebrated Criminal Trials in Scotland, pp. 347 *et seq.*, Edinb. 1785; and in Pitcairn's "Criminal Trials in Scotland," Edinb. 1833, tit. "Witchcraft," in the General Index. See in particular the case of Isabel Elliot, Sept. 13,

1678, who with nine others, judicially confessed to have been baptized by the devil, and to have had carnal copulation with him. They were all convicted and burnt. (Arnot, 360, 361.) A similar confession was made by Isobell Gowdie, 13 April, 1662; Pitcairn, vol. 4, p. 602. See also the case of Bessie Dunlop, Id. vol. 2, p. 49.

(*b*) For a full description of the instruments of torture used for this purpose, see Pitcairn, vol. 2, pp. 50, 375, 376.

(*c*) Hume's Crim. Law of Scotland, vol. 1, p. 591.

communication with evil spirits, by the means which in those days were reputed to be effectual for such a purpose. And it is possible, that among these there might be some who, in the course of a long and constant employment in such a wild pursuit, came at last to be far enough disordered, to mistake their own dreams and ravings, or hysteric affections, for the actual interviews and impressions of Satan." The following case is reported as having occurred in India in 1830. Three prisoners were made to confess before the police, to having, by means of sorcery, held forcible connection with the wife of the prosecutor, then in the tenth month of her pregnancy, beat or otherwise ill-treated her, and afterwards taken the child out of her womb, and introduced into it, in lieu thereof, the skin of a calf and an earthen pot, in consequence of which she died. These confessions were corroborated, by the discovery in the womb of the deceased of an earthen pot and a piece of calf's skin; but the prisoners were acquitted, principally on the ground, that the earthen pot was of a size that rendered it impossible to credit its introduction during life. (*d*)

**573.** The above causes affect, more or less, every species of confessorial evidence. But extra-judicial confessorial statements, especially when not plenary, are subject to additional infirmative hypotheses, which are sometimes overlooked in practice. These are mendacity in the report; misinterpretation of the language used and incompleteness of the statement. (*e*) 1. "Mendacity." The supposed confessorial statement may be, either wholly or in part, a fabrication of the deposing witnesses. And here it should not be forgotten, that of all sorts

(*d*) *Kutti v. Chatapan and others*; Udalt of Madras, 20.  
*Arbuthnot, Reports of the Foujdaree* (e) 3 Benth. Jud. Ev. 113.

of evidence, that which we are now considering is the most easy to fabricate, and, however false, the most difficult to confront and expose by any sort of counter-evidence, direct or circumstantial. (*f*) 2. "Misinterpretation." No act or word of man, however innocent or even laudable, is exempt from this. *E. g.*, a paper in the handwriting of the accused is found in his possession, in which he is spoken of as guilty of the offense imputed to him. This is consistent with his guilt; but on the other hand, that paper may be a libel on him, which the accused has kept with a view of refuting the libel, or of bringing the libeller to justice. (*g*) Again, entirely fallacious conclusions may be drawn from language uttered in jest, or by way of bravado; (*h*) as where a man wrote to his friend, who was summoned as a juror on a trial which excited much public attention, conjuring him to convict the defendant, guilty or innocent. (*i*) But equally unfounded inferences are sometimes drawn from words, supposed to be confessional, but which were used with reference to an act not identical with the subject of accusation or suspicion; as where a man who has robbed or beaten

(*f*) Foster's Cr. Law, 243; 4 Blackst. Comm. 357, 1 Greenl. Evid. § 214, 7th Ed.

(*g*) 3 Benth. Jud. Ev. 114.

(*h*) The unfortunate result of the case of Richard Coleman, at the Kingston Spring Assizes of 1749, was partly, if not chiefly, owing to this cause. A woman had been brutally assaulted by three men, and died from the injuries she received. It appeared that at the time of the commission of the outrage, one of the offenders called another of them by the name of Coleman, from which circumstance suspicion attached to the prisoner. Coleman, who was in a public house

intoxicated, was asked by a person there with the view of ensnaring him, if he was not one of the parties concerned in that affair; to which he answered, according to one account, "Yes I was, and what then?" or according to another account, "If I was, what then?" On this and some other circumstances he was convicted and executed, but the real criminals, were afterwards discovered. Two of them were executed, confessing their guilt, the third having been admitted to give evidence for the crown. Wills, Circ. Evid. 67 & 71, 3rd Ed.

(*i*) 3 Benth. Jud. Ev. 115.

another, hearing that he has since died, utters an exclamation of regret for having ill-treated him. In the case of a female accused of adultery, part of the proof was a self-disserving statement in these words, 'I am very unhappy—for God's sake, hide my faults—those who know not what I suffered, will blame my conduct very much.' "Am I," said Lord Stowell, commenting on this, "placed in such a situation, by this evidence, as to say that it must necessarily refer to adultery? She has been detected in imprudent visits—it might allude to them." (*k*). But of all the causes which lead to the misinterpretation of the language used by suspected persons, the greatest are the haste and eagerness of witnesses, and the love of the marvellous so natural to the human mind, by which people are frequently prompted to mistake expressions, as well as to imagine or exaggerate facts, especially where the crime is either very atrocious or very peculiar. (*l*) 3. The remaining cause of error in confessorial evidence of this nature is "Incompleteness:" *i. e.*, where words, though not misunderstood in themselves, convey a false impression, for want of some explanation which the speaker either neglected to give, or was prevented by interruption from giving, or which has been lost in consequence of the deafness or inattention of the hearers. "Ill hearing makes ill

(*k*) *Williams v. Williams*, 1 Hagg. Cons. Rep. 304.

(*l*) See *supra*, ch. 1, § 295; and note to *Earle v. Picken*, 5 C. & P. 542. A remarkable instance of this is presented in the case of *R. v. Simons*, 6 C. & P. 540. The prisoner was then indicted for the then *capital* offense of having set fire to a barn; and a witness was called to prove that, as the prisoner was leaving the magistrate's room after his committal, he was over-

heard to say to his wife, "Keep yourself to yourself, and don't marry again."

To confirm this another witness was called, who had also overheard the words, and stated them to be, "Keep yourself to yourself, and keep your own counsel:" on which Alderson, B., remarked, "One of these expressions is widely different from the other. It shows how little reliance ought to be placed on such evidence." The prisoner was acquitted.

rehearsing," said our ancestors. Expressions may have been forgotten, or unheeded, in consequence of witnesses not being aware of their importance: *e. g.*, a man suspected of larceny, acknowledges that he took the goods against the will of the owner, adding that he did so because he thought they were his own. Many a bystander, ignorant that this latter circumstance constitutes a legal defense, would remember only the first part of the statement.

**574.** Before dismissing the subject of self-disserving evidence in criminal cases, it remains to advert to the force and effect of "Non-responion," or silence under accusation, "Evasive responion," and "False responion." First, then, with respect to "Non-responion." When a man is interrogated as to his having committed a crime, or when a statement that he has committed a crime is made in his presence, and he makes neither reply nor remark, the inference naturally arises that the imputation is well founded, or he would have repelled it. We have already alluded to the fallacy of the assumption that silence is in all respects tantamount to confession; (*m*) and however strongly such a circumstance may tell against suspected persons in general, there are many considerations against investing it with conclusive force. 1. The party, owing to deafness or other cause, may not have heard the question or observation; or, even if he has, may not have understood it as conveying an imputation upon him. 2. Supposing the accused to have heard the question or observation, and understood it as conveying an imputation upon him, his momentary silence may be caused by impediment of utterance, or a feeling of surprise at the imputation. (*n*) 3. When this kind of evidence is in an extra-judicial form, the transaction

(*m*) *Supra*, sect. I, § 521.

(*n*) Burrill, Circ. Evid. 575 & 483.



comes to the tribunal through the testimony of witnesses, who may either have misunderstood, or who willfully misreport it. 4. Assuming the matter correctly reported, the following observations of Bentham are certainly very pertinent and forcible: "The strength of it" (*i. e.*, the inference of guilt from evidence like that we are now considering) "depends principally upon two circumstances: the strength of the appearances (understand, the strength they may naturally be supposed to possess, in the point of view in which they present themselves to the party interrogated),—the strength of the appearances, and the quality of the interrogator. Suppose him a person of ripe years, armed by the law with the authority of justice, authorized (as in offenses of a certain magnitude persons in general commonly are, under every system of law) to take immediate measures for rendering the supposed delinquent forthcoming for the purposes of justice,—authorized to take such measures, and to appearance having it in contemplation so to do;—in such case, silence instead of answer to a question put to the party by such a person, may afford an inference little (if at all) weaker, than that which would be afforded by the like deportment in case of judicial interrogation before a magistrate. Suppose (on the other hand) a question put in relation to the subject, at a time distant from that in which the cause of suspicion has first manifested itself,—put at a time when no fresh incident leads to it,—put, therefore, without reflection, or in sport, by a child, from whom no such interposition can be apprehended, and to whose opinion no attention can be looked upon as due, in a case like this, the strength of the inference may vanish altogether." (*o*)

**575.** Connected with the subject of non-responion is that of incomplete or "Evasive responion:" *i. e.* where a man is interrogated as to his having committed a crime, or when a statement that he has committed a crime is made in his presence, and he either evades the question; or, while denying his guilt, refuses to show his innocence, or to answer or explain any circumstances which are brought forward against him as criminative or suspicious. The inference of guilt from such conduct is weakened by the following additional considerations. 1. A man ever so innocent, can not always explain the circumstances which press against him. Thus on a charge of murder, the accused declared himself unable to explain how his night-dress became stained with blood; the truth being that, unknown to him, his bed-fellow had had a bleeding wound. (*p*) So a man charged with larceny, could not explain how the stolen property found its way into his house or trunk, it having been, unknown to him, deposited there by others. (*q*) 2. In many cases an accused or suspected person can only explain particular circumstances, by criminating other individuals whom he is unwilling to expose, or disclosing matters which, though unconnected with the charge, he is anxious to conceal. Sometimes, too, though blameless in the actual instance, he could only prove himself so by showing that he was guilty of some other offense. 3. Where a prosecution is altogether groundless—the result of conspiracy, or likely to be supported by perjured testimony, it is often good policy on the part of its intended victim, not to disclose his defense until it is judicially demanded of him on his trial.

**576.** "False responion," however, is a criminative

(*p*) See a case of this kind in March 11, 1837.  
Chambers' Edinburgh Journal, for (*q*) See bk. 2, pt. 2, § 206.

fact very much stronger than either of the former. Bentham justly observes that, in justification of simple silence, the defense founded on incompetency on the part of the interrogator may be pertinent, and even convincing; but that to false responsion the application of it could scarcely extend. To the claim which the question had to notice, the accused or suspected person has himself borne sufficient testimony; so far from grudging the trouble of a true answer, he bestowed upon it the greater trouble of a lie. (r) The infirmative hypotheses here seem to be, 1. The possibility of extra-judicial conversations having been misunderstood or misreported. 2. As innocent persons, under the influence of fear, occasionally resort to false evidence in their defense, false statements may arise from the same cause. The maxim "*Omnia præsumuntur contra spoliatores*," to which that subject belongs, has been examined in a former chapter. (s)

577. While the vulgar notion, derived probably from mediæval times,—when it was sanctioned by the then all powerful authority of the civilians and canonists, (t)—that confessions of guilt are necessarily true, is at variance with common sense, experience, law, and practice; still, it must never be forgotten that, in general, such confessions constitute proof of a very satisfactory, and when in a judicial or plenary shape, of the most satisfactory character. Reason and the universal voice of mankind alike attest this; and the legitimate use of the unhappy cases above recorded, and others of a similar stamp, is to put tribunals on their guard against attaching undue weight to this sort of evidence. The employing them as bugbears to terrify,

(r) 3 Benth. Jud. Ev. 94.

(t) See *supra*, § 554.

(s) *Supra*, ch. 2, sect. 2, sub-sect. 8.

or the converting them into excuses for indiscriminate scepticism or incredulity, is a perversion, if not a prostitution of the human understanding.

# CHAPTER VIII.

## EVIDENCE REJECTED ON GROUNDS OF PUBLIC POLICY.

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**578.** Under this head might in strictness be classed, all evidence which may be rejected by virtue of any exclusionary rule, seeing that it is to public policy all such rules owe their existence. But the expression, "evidence rejected on grounds of public policy," is here used in a limited sense ; as signifying that principle by which evidence, receivable so far as relevancy to the matters in dispute is considered, is rejected on the ground that, from its reception, some collateral evil would ensue to third parties or to society. One species of this has been already treated of, under the head of witnesses who, as has been shown, are privileged from answering questions having a tendency to criminate, or to expose them to penalty or forfeiture, or even, in some cases, merely to degrade them. (*a*)

(*a*) Bk. 2, pt. 1, ch. 1.

But taking a general view of the subject, the matters thus excluded on grounds of public policy may be divided into political, judicial, professional, and social. Under the first come all secrets of state, such as state papers; and all communications between government and its officers;—the privilege in such cases, not being that of the person who is in possession of the secret, but that of the public, as a trustee for whom the secret has been intrusted to him. (*b*) Another illustration of the same privilege is to be found in the rule, that the channels through which information reaches the ears of government must not be disclosed. (*c*)

**579. 2<sup>o</sup>. Judicial.** The principal instance of this is in the case of jurymen. First, grand jurors can not, at least in general, be questioned as to what took place among, or before them, while acting as such. (*d*) In an early case on this subject (*e*) we are informed, that “the judge would not suffer a grand jurymen to be produced as a witness, to swear what was given in evidence to them, because he is sworn not to reveal the secrets of his companions.”<sup>1</sup> “See,” adds the reporter, “if a witness is questioned for a false oath to the grand jury, how

(*b*) See *Dawkins v. Lord Rokeby*, 15 M. & W. 169, and the L. Rep., 8 Q. B. 255; per Dallas, C. cases there referred to.

*J., Home v. Bentinck*, 2 B. & B. 130, 162. (*d*) Tayl. Ev. § 863, 4th Ed.

(*e*) Clayt. 84, pl. 140.

(*c*) See the *Attorney-General v.*

<sup>1</sup> One reason for this, says 1 Greenleaf on Evidence, § 252: “may be to prevent the escape of the party, should he know that proceedings were in train against him; another may be to secure freedom of deliberation and opinion among the grand jurors, which would be impaired if the part taken by each might be made known to the accused. A third reason may be to prevent the testimony produced before them from being contradicted, at the trial of the indictment, by subornation and perjury on the part of the accused.”

it shall be proved if some of the jury be not sworn in such a case." He refers to a case of *Hitch v. Mallet*, where the point was raised, and adds a quære what became of it. Considering that the grand jury are the inquest of the county, whose duty it is not merely to examine the bills of indictment sent before them, but to inquire into its state, and present to the Queen's justices anything they may find amiss in it, there appears reason for throwing the protection of secrecy over their deliberations. But perjury, or indeed any other offense committed in their presence, and afterwards made the subject of an indictment or information, is a very different matter. Suppose a witness were to murder or assault another witness in the presence of the grand jury, would not the evidence of its members be receivable against him? Or suppose, on a dispute arising out of the business before them, one of the grand jury were to murder or assault another, is he to go unpunished? The grand juror's oath is to keep secret "the Queen's counsel, his fellows; and his own:" (*f*) it is obvious that the cases just put do not come under either of the latter heads; and, by instituting the prosecution, the crown has waived the privilege of secrecy so far as its rights are concerned. (*g*)<sup>1</sup>

(*f*) 8 Ho. St. Tr. 759, 772, note. It Abr. Corone, pl. 113.

was formerly considered treason or felony in a grand juror to disclose the king's counsel, 27 Ass. pl. 63; Bro. 863, 4th Ed. (*g*) See 4 Christ. Blackst. Com. 126, note 4, 303, note 1, and Tayl. Ev. §

<sup>1</sup> The extent of the limitation upon the testimony of grand jurors is best defined by the terms of their oath of office, by which "the commonwealth's counsel, their fellows, and their own, they are to keep secret." Per Bigelow, J., *Commonwealth v. Hill*, 11 Cush. 137, 140. The privilege extends to the clerk of the grand jury (1 Greenleaf on Evidence, § 252), to the district attorney or prosecuting officer, if present at their deliberations. *McLellan v. Richardson*, 1 Shepl. 82; Com-

**580.** Secondly, the evidence of petty jurors is not receivable to prove their own misbehavior, or that a verdict which they have delivered was given through

monwealth v. Tilden, cited 1 Greenleaf on Evidence, § 252, note 4; Wharton on Criminal Law, § 512; citing 4 Bost. L. R. 4. They are not permitted to disclose who agreed or who did not agree in finding a bill of indictment; nor the evidence presented. *McLellan v. Richardson*, 1 Shepl. 82; *Low's Case*, 4 Greenl. 439, 446, 453; *Burr's Trial*, Evidence for Defendant, p. 2; *Huidekoper v. Colton*, 3 Watts, 56. They may, however, be compelled to disclose if a particular witness testified before them. *Huidekoper v. Colton*, 3 Watts, 56; *Commonwealth v. Hill*, 11 Cush. 137, 140; or whether twelve of their number actually concurred in bringing a bill. *Commonwealth v. Smith*, 9 Mass. 107; *Low's Case*, 4 Greenl. 439; *McLellan v. Richardson*, 1 Shepl. 82. But this is not settled; see the contrary held in *State v. Fassett*, 16 Conn. 457; *State v. Baker*, 20 Mo. 538; *People v. Hubbard*, 4 Den. 133; holding that the affidavit of one grand juror will not be received for that purpose. The better opinion (says Wharton on Criminal Law, § 509) is that the affidavit of a grand juror is not receivable to impeach the finding of his fellows. *State v. Doon*, R. M. Charl. 1; *State v. McLeod*, 1 Hawks, 344; *State v. Baker*, 20 Mo. 538. Or to show how many grand jurors were present, or voted in favor of a bill. *State v. Fassett*, 16 Conn. 457; *State v. Baker*, 20 Mo. 538; *People v. Hubbard*, 4 Den. 133. When a grand juror was grossly intoxicated while discharging his duty as such, a presentment was made by the rest of the grand jury, and an indictment against him ordered by the court in the English case of *Penn v. Keffer*, Addison, 290. As to which concurrence it seems that the certificate of their foreman is not conclusive evidence. (Id.) As to whether a grand juror may be asked whether the testimony of a person, given before the grand jury agrees with the same person's testimony on the trial, the rule is not everywhere the same. See 1 Greenleaf on Evidence, § 252, and cases cited; Wharton's American Criminal Law, §§ 508, 509, 510. *State v. Fassett*, 16 Conn. 457; *Thomas v. Commonwealth*, 2 Robinson, 295; *State v. Offutt*, 4 Blackf. 355; *Huidekoper v. Colton*, 3 Watts, 56. See as to rule in North Carolina, *State v. Broughton*, 7 Ired. 96. But not in New Jersey; *Imlay v. Rogers*, 2 Halsted, 347; nor in Missouri; *State v. Baker*, 20 Mo. 338. The statutes of New York provide (Part iv., c. 2, tit. 4, art. 1.



mistake. (*h*) In order to guard against misconceptions as to the findings of juries, it is the established practice of the courts not to receive a verdict, unless

(*h*) *Goodman v. Cotherington*, 1 Sid. 235; *Norman v. Beamont*, Willes, 487, note; *Palmer v. Crowle*, Andr. 382; *Vaise v. Delaval*, 1 T. R. 11; *Straker v. Graham*, 4 M. & W. 721. **The competency of jurymen, as witnesses in a cause which they are trying, is a wholly different question; for which see bk. 2, pt. 1, ch. 2, § 187.**

sec. 31, that "members of the grand jury may be required by any court to testify whether the testimony of a witness, examined before such jury, is consistent with, or different from, the evidence given by such witness before such court, and they may also be required to disclose the testimony given before them by any person upon a complaint against such person on perjury, or upon his trial for such offense; but in no case can a member of a grand jury be obliged or allowed to testify or declare in what manner he or any other member of the jury voted on any question before them, or what opinions were expressed by any juror in relation to any such question. See the Massachusetts statute, Rev. Stat., ch. 136, §§ 13, 14. It has been held inadmissible for a grand juror to show that a bill was found without testimony, or upon insufficient testimony; *People v. Hubbard*, 4 Den. 133; *State v. Boyd*, 2 Hill, 288; *Turk v. State*, 2 Hammond, Part II., 240; or that only one offense was sworn to before the grand jury; *People v. Hubbard*, 4 Den. 133. In Missouri it is provided by statute that no grand juror shall disclose any evidence given before the grand jury; *State v. Baker*, 20 Mo. 338; but in *State v. Brewer*, 8 Mo. 373, it was held admissible for a grand juror to state that a certain person testified as to certain subjects before them; but see *Beam v. Link*, 27 Mo. 261. In Indiana it has been held admissible for a grand juror to testify in a court of justice to what passed before the grand jury; *Burnham v. Hatfield*, 5 Blackf. 21; and it was held in *Granger v. Warrington*, that where grand jurors are not required to take an oath of secrecy, they are competent witnesses to prove general facts which come to their knowledge while acting as grand jurors (*Wharton's Am. Criminal Law*, § 511). See as to the rules, *People v. Hulbut*, 4 Den. (N. Y.) 133; *State v. Oxford*, 30 Tex. 428; *State v. Squire*, 10 N. H. 558; *State v. Symonds*, 36 Me. 128; *Commonwealth v. Crans*, 3 Penn. Law Journal, 422; *State v. Offutt*, 4 Blackf. 355; *People v. Young*, 31 Cal. 564; *Crocker v. State*, Meigs, 127

all the jurors by whom it is given are present and within hearing; and, after it is recorded, the officer rehearses it to them as recorded, and asks them if that is the verdict of them all. The allowing a jurymen to prove the real or pretended misbehavior or mistake of himself or his companions would open a wide door to fraud and malpractice in cases where it is sought to impeach verdicts.<sup>1</sup>

United States v. Charles, 2 Cranch. C. C. 76; Commonwealth v. Hill, 11 Cush. (Mass.) 137; Imlay v. Rogers, 2 Halst. (N. J.) 347; Commonwealth v. Mead, 12 Gray (Mass.) 167; State v. McLeod, 1 Hawks. (N. C.) 344; State v. Beebe, 17 Minn. 241.

<sup>1</sup> As a general rule, the testimony of a juror is inadmissible to impeach a verdict. Read v. Commonwealth, 22 Gratt. 924; State v. Godwin, 5 Ired. 401; Dana v. Tucker, 4 Johns. 487; Johnson v. State, 27 Tex. 758; Bridge v. Eggleston, 14 Mass. 245; Commonwealth v. Drew, 4 Mass. 391; Sargeant v. —, 5 Cowen, 106; Grinnell v. Phillips, 1 Mass. 541; Crawford v. State, 2 Yerg. 60, Hudson v. State, 9 Id. 408; State v. Stokely, 16 Minn. 282; State v. Coupenhaver, 39 Mo. 430; Ex parte Caykendall, 6 Cowen, 53; State v. Millecan, 15 La. Ann. 577; People v. Columbia, &c., 1 Wend. 297; State v. Freeman, 5 Conn. 348; Stanton v. State, 8 Eng. (13 Ark.) 317; Bennett v. State, 3 Ind. 167; State v. Ayer, 3 Fost. (N. H.) 301; People v. Carnal, 1 Parker, C. C. 256; People v. Baker, 1 Cal. 403; Cluggage v. Swan, 4 Binney, 150; State v. Doon, R. M. Charlton, 1. But the affidavits of jurors will sometimes be received for purposes of explaining, correcting, or enforcing a verdict; Dana v. Tucker, 4 Johns. 487; State v. Ayer, 3 Fost. (N. H.) 301; Jackson v. Dickenson, 15 Johns. 309; Farrer v. State, 2 Ohio St. (N. S.) 54; Cochran v. Street, 1 Wash. 79; State v. Howard, 17 N. H. 171; and in California, by statute; Donner v. Palmer, 23 Cal. 40. Subsequent declarations of a jurymen, after a general verdict, are not admissible to qualify it; Wharton on Criminal Law (7th Ed.) § 3328; though affidavits of bystanders as to what passed within their knowledge touching the delivery of a verdict, may be taken; Id. In Tennessee, the English rule appears to be rejected altogether; Crawford v. State, 2 Yerg. 60; Cochran v. State, 7 Humph. 544; though it has been held that affidavits of jurors, that their verdict was founded upon certain

**581. 3<sup>o</sup>. Professional.** 1. At the head of these stand communications made by a party to his legal advisers, *i. e.*, counsel, attorney, &c.; (*i*) and this in-

(*i*) Waldron v. Ward, Styl. 449; Gaskell, 1 Myl. & K. 98; Hibberd v. Wilson v. Rastall, 4 T. R. 753; Foote Knight, 2 Exch. 11; Cleave v. Jones, v. Hayne, Ry. & M. 165; Taylor v 7 Exch. 421. See also Introd. pt. 2, Foster, 2 C. & P. 195; Du Barre v. § 53. Livette, 1 Peake, 77; Greenough v.

portions of the evidence submitted to them (which evidence may afterwards be held to be illegal), will not be sufficient to warrant the granting of a new trial; Hudson v. State, 9 Yerg. 408. Where a juror has denied, under oath, that he has formed an opinion, the affidavit of a witness to the contrary will not impeach a verdict; Epps v. State, 19 Geo. 102; nor will affidavits be received after verdict as to the conversation of jurors respecting their verdict; Drummond v. Leslie, 5 Blackf. 453; or to their improper motives; Wharton on Criminal Law (7th Ed.) § 3329; or from the jurors themselves to purge themselves from an imputation of misconduct; Organ v. State, 26 Miss. 78; Ray v. State, 15 Geo. 223; French v. Smith, 4 Vt. 363; People v. Backus, 5 Cal. 275; McGuffie v. State, 17 Geo. 497; Sheldon v. Perkins, 37 Vt. 550; Sawyer v. Hannibal, &c., R. R., 37 Mo. 240; Thomas v. Chapman, 45 Barb. 98; People v. Hughes, 29 Cal. 257; but see, contra, Moffett v. Bowman, 6 Gratt. 219; Frie's Case, 1 Wh. St. Tr. 605; Taylor v. Greely, 3 Greenl. 204. But a juror may be admitted to impeach the conduct of his fellow-jurymen. United States v. Reid, 12 How. 361; Commonwealth v. Mead, 12 Gray, 167; Deacon v. Shreve, 2 Zab. (N. J.) 176. Says Wharton (On Criminal Law, 7th Ed., § 3328): "The true view is this: jurors can not be received to qualify, by parol testimony, matters of record, nor can they be permitted to state matters concerning their deliberations which may be proved aliunde. From necessity, however, when gross injustice has been wrought from misconduct or misapprehension in their deliberations, they are to be permitted to prove such misconduct or misapprehension." Thus they may prove that the case was decided by lot; Wright v. Illinois Tel. Co., 20 Iowa, 19; see People v. Hughes, 29 Cal. 257; Wharton on Criminal Law, § 3321; that the instructions of the court were misunderstood; Packard v. United States, 1 Iowa, 225; or that the verdict was agreed to on the representation that the Governor would par-

cludes all media of communication between them ; such as clerks, (*j*) interpreters, (*k*) or agents. (*l*) But the privilege does not extend to matters of fact, which the attorney knows by any other means than confidential communication with his client, though if he had not been employed as attorney he probably would not have known them. (*m*) And the privilege is not the privilege of the professional man, but of the client, who may waive it or not, as he pleases. (*n*) And his refusal to waive it, raises no presumption against him. (*o*)<sup>1</sup>

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|---|---|
| ( <i>j</i> ) Taylor v. Foster, 2 C. & P. 195. | and the cases there referred to. Brown    |
| ( <i>k</i> ) Du Barre v. Livette, 1 Peake,    | v. Foster, 1 H. & N. 736.                 |
| 77.   | ( <i>n</i> ) Tayl. Ev. § 843, 4th Ed.     |
| ( <i>l</i> ) Parkins v. Hawkshaw, 2 Stark,    | ( <i>o</i> ) Wentworth v. Lloyd, 10 H. L. |
| 239.  | C. 589.                                   |
| ( <i>m</i> ) Dwyer v. Collins, 7 Exch. 639,   |   |

don on the jurors' recommendation; Crawford v. State, 2 Yerg. 60; and see Deacon v. Shreve, 2 Zab. (N. J.) 176; Heffron v. Gallupe, 55 Me. 563.

<sup>1</sup> Holmes v. Barbin, 15 La. Ann. 553; March v. Ludlum, 3 Sandf. Ch. 35; Rhoades v. Selin, 4 Wash. 718; Chew v. Farmers' Bank, 2 Md. Ch. 231; Heister v. Davis, 3 Yeates (Pa.) 4; King v. Barrett, 11 Ohio St. 261; Gordan v. Hess, 13 Johns. 492; Chirac v. Reinicker, 11 Wheat. 280; Parker v. Carter, 4 Munf. 273; Rogers v. Dare, Wright (Ohio), 136; Crawford v. McKissack, 1 Port. (Ala.) 433; McClellan v. Longfellow, 32 Me. 494; Riley v. Johnston, 13 Ga. 260; Jenkinson v. State, 5 Blackf. (Ind.) 465. But an attorney may be required to disclose by whom he is employed. Chirac v. Reinicker, 11 Wheat. 280; Satterlee v. Bliss, 36 Cal. 489; Martin v. Anderson, 21 Ga. 301; Brown v. Payson, 6 N. H. 443. And the privilege does not extend to third persons present at a conference between attorney and client. Goddard v. Gardner, 28 Conn. 172; Hoy v. Morris, 13 Gray, 519; Jackson v. French, 3 Wend. 337. And these rules can be enforced by the court of its own motion. People v. Atkinson, 40 Cal. 284. The rule protecting professional communications has been held to apply to a case where one seeking counsel pays no fee, and employs other attorneys, and even where the lawyer con-

582. 2. Communications to a medical man, even in the strictest professional confidence, have been held not protected from disclosure, (*p*)—a rule harsh in

(*p*) *Duchess of Kingston's case*, 20 *bons*, 1 C. & P. 97.  
Ho. St. Tr. 572 *et seq.*; *R. v. Gib-*

sulted is afterwards employed on the other side; *Cross v. Rig-*  
*gins*, 50 Mo. 335; to the contents of a pleading verified by a  
client, and left with the lawyer, to be filed if he thought best,  
and which was not filed; *Neal v. Patten*, 47 Ga. 73; to where  
an attorney drew a deed and a receipt for a prisoner on the  
day of an alleged murder committed by the latter; *Graham*  
*v. People*, 63 Barb. 468; to an attorney who read over a deed  
to certain grantees after it was drawn; *Rogers v. Griffin*, 64  
Barb. 373. But the attorney of a creditor, by accepting a re-  
tainer from the latter's debtor, can not evade the rule; *Mayer*  
*v. Hermann*, 10 Blatchf. 256; nor does the rule apply to a  
scrivener; *Rundel v. Yates*, 48 Miss. 685; or a mere convey-  
ancer; *Matthew's Estate*, 1 Phil. (Pa.) 292; *Matthew's Estate*,  
5 Pa. Jan. J. R. 149; nor are communications privileged when  
made by one party to the attorney of the other, looking to a  
compromise; *McLean v. Clark*, 47 Ga. 24; or by a client to  
his attorney, forbidding him to pay over certain moneys to an  
assignee; *Mulford v. Muller*, 3 Abb. (N. Y.) App. Dec. 330;  
or when the attorney is himself a party to the transaction;  
*Jeanes v. Fredenberg*, 3 Pa. Law J. R. 199; or when the commu-  
nications were made in presence of all parties; *Coveney v. Tan-*  
*nahill*, 1 Hill 33; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528;  
*Whiting v. Barney*, 30 N. Y. 330; *Britton v. Lorenz*, 45 N. Y.  
51; *Parish v. Gates*, 29 Ala. 254; *Hall v. Lyon*, 27 Mo. 570;  
*Carr v. Weld*, 15 N. J. L. (3 Green) 314; *Rice v. Rice*, 14 B.  
Mon. 417; *Dun v. Amos*, 14 Wis. 106; *Hemingway v. Smith*,  
28 Vt. 701; and see *Chuboon v. State*, 21 Gratt. 822; or where  
it does not appear that the information was not derived from  
other sources than the client's communications; *Chillicothé,*  
*&c. Co. v. Jameson*, 48 Ill. 281; and see various cases and cir-  
cumstances affecting the rule considered in *Re Bellis*, 3 Ben-  
edict, S. C. N. Y. 386; *Woburn v. Henshaw*, 101 Mass. 193;  
*Higbee v. Dresser*, 103 Id. 523; *Heaton v. Findlay*, 21 Pa. St.  
304; *Fulton v. McCracken*, 18 Md. 528; *Lafin v. Herrington*,  
1 Blackf. 326; *State v. Marshall*, 8 Ala. 302; *De Witt v. Per-*  
*kins*, 22 Wis. 473; *Dudley v. Beck*, 3 Id. 274; *Daniel v. Daniel*,  
39 Pa. St. 191; *Proutz v. Eaton*, 41 Barb. 409; *McTavish v*

itself, of questionable policy, and at variance with the practice in France, (q) and in some of the United States of America. (r)<sup>1</sup>

(q) Bonnier, *Traité des Preuves*, § 179. (r) 1 Greenl. Ev. § 248, note (2), 7th Ed.; Appleton, *Evid. App.* 276.

Dunning, *Anth.* (N. Y.) 82, 113; Johnson v. Daverne, 19 Johns. 134; Heister v. Davis, 3 Yeates (Pa.) 4; Graham v. O'Fallon, 4 Mo. 338; Day v. Moore, 13 Gray, 522; Gower v. Emery, 18 Me. 79; Blackburn v. Crawfords, 3 Wall. 175; Hager v. Shindler, 29 Cal. 47; Phelps v. Riley, 3 Conn. 266; Mitchell v. Bromberger, 2 Nev. 345; Nave v. Baird, 12 Ind. 318; Rochester, &c. Bank v. Suydam, 5 How. (N. Y.) Pr. 254; Brayton v. Chase, 3 Wis. 456; Gallaher v. Williamson, 23 Cal. 331; Granger v. Warrington, 8 Ill. (3 Gilm.) 299; Patten v. Moor, 29 N. H. (9 Fost.) 163; Clark v. Richards, 3 E. D. Smith, 89; Wilson v. Godlove, 34 Mo. 337; Hatton v. Robinson, 14 Pick. 416; Hoffman v. Smith, 1 Cai. 157; Hull v. Lyon, 27 Mo. 570.

<sup>1</sup> In an action for divorce, the evidence of a physician who has received confessions of adultery from the defendant, in professional confidence, is not admissible, under 3 N. Y. Rev. Stat. 690, § 104. Hunn v. Hunn, 1 Thomp. & C. (N. Y.) 499. The N. Y. statute referred to is as follows: "No person, duly authorized to practice physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon. But see, as to whether the physician may waive the privilege, *quære*, Johnson v. Johnson, 14 Wend. 637. A consultation as to the means of procuring an abortion has been held not privileged under this statute. Hewett v. Prime, 21 Wend. 79. Like statutes exist in Missouri (1 R. S. 1845, ch. 186, § 20); Wisconsin (R. S. 1849, ch. 98, § 75); Michigan (R. S. 1846, Ch. 102, § 86). In Iowa, the statute extends the privilege to public officers in cases where the public interest might suffer by the disclosure (Code of Iowa, 1851, arts. 2393-2395). In an action for slander, it has been held that a statement made by a physician, that an unmarried female is pregnant, is not a privileged communication, unless made in good faith to one reasonably entitled to receive the information. Alpin v. Mor-ton, 21 Ohio St. 536.

**583.** 3. Whether communications made to spiritual advisers are, or ought to be, protected from disclosure in courts of justice, presents a question of some difficulty. It is commonly thought that the decisions of the judges in the cases of *R. v. Gilham* (*s*) and *R. v. Wild*, (*t*) added to some others that will be cited presently, have resolved this question in the negative; and the practice is in accordance with that notion. But *R. v. Gilham* only shows, that a confession of guilt made by a prisoner, in consequence of the spiritual exhortations of a clergyman that it will be for his soul's health to do so, is receivable in evidence against him—a decision perfectly well founded, because such exhortations can not possibly be considered “illegal inducements to confess.” For by this expression, as shown in a former chapter, (*u*) the law means language calculated to convey to the mind of a person accused or suspected of an offense, that by acknowledging guilt he will better his position, so far as it may be affected by the temporal consequences of that offense. And the ground on which the law rejects a confession, made after such an inducement to confess, is the reasonable apprehension that, in consequence of it, the party may have been led to make a false acknowledgment of guilt,—an argument wholly inapplicable where he is only told that, by his avowing the truth, a spiritual benefit will accrue to him. *R. v. Wild* is even less to the purpose; as the party who used the exhortation there neither was, nor professed to be a clergyman. The other cases to which allusion has been made, are an anonymous one in *Skinner*, (*v*) *R. v. Sparkes*, (*w*)

(*s*) 1 Moo. C. C. 186.

(*t*) *Id.* 452.

(*u*) *Supra*, ch. 7, sect. 3, sub-sect. 3,

(*v*) *Skinn.* 404.

(*w*) Cited in *Du Barre v. Livette*, 1 Peake, 77.

Butler v. Moore, (x) and Wilson v. Rastall. (y) In the first the question was respecting a confidential communication to a man of law, which Lord Chief Justice Holt, as might have been expected, held privileged from disclosure; adding obiter that it was otherwise "in the case of a gentleman, parson, &c." The second and third are decisions, one by Buller, J., on circuit, and the other by the Irish Master of the Rolls, that confessions to a Protestant or Roman Catholic clergyman are not privileged; and in the fourth, the judges in banc say obiter, that the privilege is confined to the cases of counsel, solicitor, and attorney. How far a particular form of religious belief being dis-favored by law at the period (A. D. 1802), affected the decision in Butler v. Moore, is not easy to say; but both that case and R. v. Sparkes leave the general question untouched; and on the latter case being cited to Lord Kenyon, in Du Barre v. Livette, (z) he said, "I should have paused before I admitted the evidence there admitted." He however decided that case on the ground, that confidential communications to a legal adviser were distinguishable from others. It is also to be observed that, the subject coming incidentally before Best, C. J., in Broad v. Pitt, (a) very shortly after R. v. Gilham, he referred to that case as deciding that the privilege in question did not apply to a clergyman; but added, "I, for one, will never compel a clergyman to disclose communications made to him by a prisoner; but, if he chooses to disclose them, I shall receive them in evidence." In a case of R. v. Griffin, (b) tried before Alderson, B., at the Central Criminal Court, part of the evidence against the accused, consisted of certain

(x) MacNally's Evid. 253.

(a) 3 C. &amp; P. 518.

- (y) 4 T. R. 753.

(b) 6 Cox, Cr. Cas. 215

(z) 1 Peake, 77.



conversations between her and her spiritual adviser, the chaplain of a workhouse, relative to the transaction which formed the subject of accusation. On this evidence being offered, the judge expressed a strong opinion that it was not receivable, adding, however, "I do not lay this down as an absolute rule; but I think such evidence ought not to be given;" and the counsel for the prosecution accordingly withdrew it. The case is not fully reported, and the result is not stated. And lastly in *R. v. Hay*, (c) where the prisoner was indicted for stealing a watch, the watch was traced to the possession of a Roman Catholic priest, who was called as witness for the prosecution; and who, on being asked, "From whom did you receive that watch?" refused to answer, as he said he "received it in connection with the confessional." Hill J., ruled that he was bound to answer, on the ground that by the above question he was not asked to disclose anything stated to him in the confessional; a decision apparently unimpeachable in itself, but which leaves the general question untouched.

584. There can not, we apprehend, be much doubt that, previous to the Reformation, statements made to a priest under the seal of confession were privileged from disclosure, except perhaps when the matter thus communicated amounted to high treason. In the old laws of Hen. I. (d) is this passage, "Caveat sacerdos, ne de hiis qui ei confitentur peccata sua alicui recitet quod ei confessus est, non propinquis nec extraneis; quod si fecerit, debonatur, et omnibus diebus vite sue ignominiosus peregrinando poeniteat." The laws of Hen. I. are of course not binding per se, and are only valuable as guides to the common law; but it is otherwise with the statute *Articuli Cleri* (9 Edw. II.), c. 10, which is

(c) 2 Fost. & F. 4.

(d) Leges Hen. I., c. 5, § 17.

as follows. (e) “Quandoque aliqui confugientes ad ecclesiam . . . dum sunt in ecclesia custodiuntur per armatos infra cimiterium, et quandoque infra ecclesiam, ita arte quod non possunt exire locum sacrum causa superflui ponderis deponendi, nec permittitur eis necessaria victui ministrari. Responsio : . . . dum sunt in ecclesia, custodes eorum non debent morari infra cimiterium, nisi necessitas vel evasionis periculum hoc requirat. Nec arcentur confugi dum sunt in ecclesia, quin possint habere vite necessaria, et exire libere pro obsceno pondere deponendo. Placet etiam Domino Regi ut latrones appellatores, quandocumque voluerint, possint sacerdotibus sua facinora confiteri ; sed caveant confessores, ne erronee hujusmodi appellatores informant.” In commenting on this statute, Sir Edward Coke, writing, be it remembered, after the Reformation, expresses himself as follows : (f)—“Latrones vel appellatores. This branch extendeth only to thieves and approvers indicted of felony, but extended not to high treasons : for if high treason be discovered to the confessor, he ought to discover it, for the danger that thereupon dependeth to the king and the whole realm, therefore this branch declareth the common law, that the privilege of confession extendeth only to felonies : And albeit, if a man indicted of felony becometh an approver, he is sworn to discover all felonies and treasons, yet he is not in degree of an approver in law, but only of the offense whereof he is indicted ; and for the rest, it is for the benefit of the king, to move him to mercy : So as this branch beginneth with thieves, extendeth

(e) The above version of the statute is taken from the valuable work entitled “Statutes of the Realm, printed by command of his Majesty, King George the Third, in pursuance of an Address of the House of Commons :

From Original Records and Authentic Manuscripts,” A. D. 1810 *et seq.* It differs in several respects from that given by Sir Edward Coke in the 2nd Institute.

(f) 2 Inst. 629.

only to approvers of thievery or felony, and not to appeals of treason ; for by the common law, a man indicted of high treason could not have the benefit of clergy (as it was holden in the king's time, when this act was made), nor any clergyman privilege of confession to conceal high treason : and so was it resolved in 7 Hen. V. (Rot. Parl. anno 7 Hen. V. nu. 13) ; whereupon Friar John Randolph, the Queen Dowager's confessor, accused her of treason, for compassing of the death of the king : And so was it resolved in the case of Henry Garnet (Hil. 3 Jac.), superior of the Jesuits in England, who would have shadowed his treason under the privilege of confession, &c. ; and albeit this act extendeth to felonies only, as hath been said, yet the caveat given to the confessors is observable, *ne erronee informet.*" We cite this passage to show the common law on this subject ; but it is very doubtful whether the caveat at the end of the above enactment, was inserted to warn the confessor against disclosing the secrets of the penitent to others. The grammatical construction and context seem to show, that it was to prevent his abusing his privilege of access to the criminal, by conveying information to him from without ; and the clause is translated accordingly in the best edition of the statutes. (*g*)

**585.** If it be an error to refuse to hold sacred the communications made to spiritual advisers, an opposite and greater error is the attempt to confine the privilege to the clergy of some particular creed. Courts of municipal law, are not called on to determine the truth or merits of the religious persuasion to which a party belongs ; or to inquire whether it

(*g*) The edition referred to in note Statutes, A. D. 1762.

(*e*). See also Ruffhead's edition of the

exacts auricular confession, advises, or permits it—the sole question ought to be, whether the party who bona fide seeks spiritual advice should be allowed it freely. By a statute of New York, (*h*)<sup>1</sup> “No minister of the Gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination.” A similar statute exists in Missouri and some other states; (*i*) and the like principle is recognized in France. (*k*)<sup>2</sup>

**586.** 4°. Social. The applications of this principle to social life are few. The principal instance is in the case of communications between husband and wife. Such, says Professor Greenleaf, (*l*) belong to the class of privileged communications, and are therefore protected, independently of the ground of interest and

(*h*) 1 Greenl. Evid. p. 326, § 247, note (1), 7th Ed.; Appleton, Evid. App. 275.

(*i*) 1 Greenl. Evid. p. 326, § 247, note (1), 7th Ed.; Appleton, Evid. App. 276, 277.

(*k*) Bonnier, *Traité des Preuves*,

§ 179, who adds, “Le système contraire détruirait la confiance, qui seule peut amener le repentir, en donnant au prêtres les apparences d'un délateur, d'autant plus odieux qu'il serait revêtu d'un caractère sacré.”

(*l*) 1 Greenl. Evid. § 254, 7th Ed.

<sup>1</sup> 3 R. S. 5th Ed. p. 690, § 103. A similar statute exists in Wisconsin (R. S. 1849, ch. 98, § 75); in Missouri (R. S. 1845, ch. 186, § 19); in Michigan (R. S. 1846, ch. 102, § 85); and in Iowa; 1 Code, 1851, art 2393.

<sup>2</sup> 1 Greenleaf on Evidence, §§ 229, 247. In *People v. Phillips*, before Hon. DeWitt Clinton, mayor of New York, court of General Sessions, June, 1813 (reported in 1 *Southwestern Law Journal*, which the editor has been unable to procure), it is said to have been held that a communication to a religious adviser was not privileged; and in *Commonwealth v. Drake*, 15 Mass. 161, it was held that confessions of a party voluntarily made to members of the same church, are not privileged, and may be given in evidence on his trial for the crime or misdemeanor so confessed by him.

identity, which precludes the parties from testifying for or against each other. The happiness of the married state, requires that there should be the most unlimited confidence between husband and wife; and this confidence the law secures, by providing that it shall be kept for ever inviolable; that nothing shall be extracted from the bosom of the wife, which was confided there by the husband. Therefore, after the parties are separated, whether it be by divorce, or by the death of the husband, the wife is still precluded from disclosing any conversations with him; though she may be admitted to testify to facts, which came to her knowledge by means equally accessible to any person not standing in that relation." And the 16 & 17 Vict. c. 83, which renders husbands and wives competent and compellable witnesses for or against each other in civil cases, contains a special enactment, sec. 3, that "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage,"<sup>1</sup> and the

<sup>1</sup> The earliest instance of elicited evidence on record, however, was in exactly the reverse of the rule now obtaining. When the Lord called unto Adam (Genesis iii. 9) in the garden of Eden, Adam was allowed to testify concerning confidential communications between husband and wife. "And the man said, The woman whom thou gavest to be with me, she gave me of the tree, and I did eat" (Id. v. 13). As to the admissibility of such testimony, see the elaborate and exhaustive arguments of Mr. Evarts against such admissibility, and of Messrs. Beach and Prior in favor thereof, and cases cited in the Tilton-Beecher trial, Abbott's edition, vol. ii., pp. 48, 66, 86, 103. The Court, Neilson, J. (Id. p. 116), decided the question in the following words: "In determining the question raised by this objection, the court holds:

"I. That the plaintiff is competent to be sworn and to testify in his own behalf.

evidence of neither husband nor wife will be received, to disprove the fact of sexual intercourse having taken place between them (*m*)—a rule justly designated by Lord Mansfield as “founded in decency, morality, and policy.” (*n*)

But secrets disclosed in the ordinary course of business, or the confidence of friendship, are not protected. (*o*)

**587.** Courts of justice, as has been shown in the Introduction to this work, (*p*) possess an inherent power of rejecting evidence, which is tendered for the purpose of creating expense, or causing vexation or delay. Such malpractices are calculated to impede the administration of the law, as well as to injure the opposite party.

(*m*) *R. v. Reading*, Cas. Temp. Hardw. 79; *R. v. Rook*, 1 Wils. 340; *R. v. Luffe*, 8 East, 192; *R. v. Kea*, 11 Id. 132; *Cope v. Cope*, 1 Moo. & R. 269; *R. v. Sourton*, 5 A. & E. 180; *Wright v. Holdgate*, 3 Carr. & K. 158.

(*n*) *Goodwright d. Stevens v. Moss*, Cowp. 594.

(*o*) See the judgment of Lord Kenyon in *Wilson v. Rastall*, 4 T. R. 758, and the cases from the State Trials there referred to.

(*p*) *Introd.* pt. 2, § 47.

“II. That, touching the principal question in issue, he is not competent to testify to any confidential communications.

“III. It is considered that this qualified direction respects the present state of our law of evidence, as the same has received legislative and judicial expression, and also respects what may remain of the rule which imposes silence or restraint by reason of the marital relation, and on grounds of public interest or policy.”

## CHAPTER IX.

### AUTHORITY OF RES JUDICATA.

|  | PARAGRAPH |
|--|-----------|
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**588.** The maxim "*Res judicata pro veritate accipitur*," (*a*) is a branch of the more general one, "*Interest reipublicæ ut sit finis litium*:" (*b*) and the reasons which have led to the universal recognition of both, are explained in the Introduction to this work.

**589.** "*Res judicata*," says the Digest, (*c*) "*dicitur, quæ finem controversiarum pronuntiatione judicis accipit: quod vel condemnatione vel absolutione contingit.*" But in order to have the effect of *res judicata*, the decision must be that of a court of competent jurisdiction, concurrent or exclusive,—"*judicium a non suo iudice datum, nullius est momenti.*" (*d*)<sup>1</sup> The decisions of

(*a*) *Introd. pt. 2, § 44.*

(*c*) *Dig. lib. 42, tit. 1, l. 1.*

(*b*) *Introd. pt. 2, §§ 41, 43.*

(*d*) *10 Co. 76 b.*

<sup>1</sup> A sentence pronounced by one who is not a proper judge, is not binding.

such tribunals are conclusive until reversed; but no decision is final unless it be pronounced by a tribunal from which there lies no appeal, or unless the parties have acquiesced in the decision, or the time limited by law for appealing has elapsed. (*e*) Moreover, the conclusive effect is confined to the point actually decided, and does not extend to any matter which came collaterally in question. (*f*) It does, however, extend to any matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision itself, though not then directly the point at issue. (*g*)<sup>1</sup>

590. The principle in question must not be confounded, either with the rule of law which requires records to be in writing, (*h*) or with its conclusive presumption that they are correctly made. (*i*) The mode of proving judicial acts, is a different thing from the effect of those acts when proved; and the rules regulating the effect of *res judicata* would remain exactly as they are, if the decisions of our tribunals could be established by oral testimony. (*k*) In truth, the record of

(*e*) 1 Ev. Poth, Part 4, ch. 3, sect. 3, art 1.

(*f*) Per de Grey, C. J., delivering the opinion of the Judges to the House of Lords, in the Duchess of Kingston's case, 11 St. Tr. 261: 1 Rol. Ab. 876; Blackham's case, 1 Salk. 290-1; R. v. Knappofft, 2 B. & C. 883; Carter v. James, 13 M. & W. 137.

(*g*) R. v. Hartington Middle Quarter, 4 E. & Bl. 780, 794.

(*h*) Bk. 2, ch. 3, sect. 1, § 218.

(*i*) *Supra*, ch. 2, sect. 2, sub-sect. 3 § 348.

(*k*) The ancient laws of Wales required in general the testimony of two witnesses, but one of the exceptions to this rule was the case of a judge respecting his judgment. "If," says the Venedotian Code, bk. 2, c. 5, § 4, "one of two parties between whom a lawsuit has taken place, deny the judgment, and the other acknowledge it, the statement of the judge is in that case final respecting his judgment." See also the Dimetian Code, bk. 2, ch. 5, § 4

<sup>1</sup> To make a matter *res judicata*, there must be a concurrence of the four conditions following, namely: 1st. Identity in the thing sued for; 2d. Identity in the cause of action; 3d. Identity



a court of justice consists of two parts, which may be denominated respectively the substantive and judicial portions. In the former—the substantive portion—the court records or attests its own proceedings and acts. To this, unerring verity is attributed by the law, which will neither allow the record to be contradicted in these respects; (*l*) nor the facts, thus recorded or attested, to be proved in any other way than by production of the record itself, or by copies proved to be true in the prescribed manner. (*m*)—"Nemo potest contra recordum verificare per patriam." (*n*)<sup>1</sup>—"Quod per recordum probatum, non debet esse negatum." (*o*)<sup>2</sup> In the judicial portion, on the contrary, the court expresses its judgment or opinion on the matter in question, and in forming that opinion it is bound to have regard, only to the evidence and arguments adduced before it by the respective parties to the proceeding,—either of whom may, in most cases, appeal from such judgment to that of a superior tribunal. Such a judgment, therefore, with respect to any third person, who was neither party nor privy to the proceeding in which it was pronounced, is only *res inter alios judicata*: and hence the rule, that it does not bind, and is not in general evidence, against any one who was not such party or

(*l*) Co. Litt. 260 a; Finch, Law, 231; Gilb. Ev. 7, 4th Ed.; 4 Co. 71 a; Litt. R. 155; Hetl. 107; 1 East, 355; 2 B. & Ad. 362.

(*m*) See several instances collected, 1 Phill. Ev. 441, 10th Ed.

(*n*) 2 Inst. 380.

(*o*) Branch, Max. 186.

tity of persons and parties to the action; 4th. Identity of the quality in the persons for or against whom the claim is made. *Atchison, &c. R. R. Co. v. Commissioners*, 12 Kan. 127. See these points considered separately in the text.

<sup>1</sup> No one can verify by the country against a record, *e. g.*, the issue upon matter of record can not be to the country.

<sup>2</sup> What is proved by the record should not be denied

privy.(p)<sup>1</sup> Bentham, indeed, contends that *res inter alios judicata* ought to be admitted, and its weight estimated by the jury;(q) but—without stopping to inquire, whether the cases in which it is receivable as evidence between third parties might properly be extended—the general principle running through our law, which requires the best evidence, (r) and rejects all evidence where there is no reasonable and proximate connection between the principal and evidentiary facts, (s) is quite as applicable to *res judicata* as to any other species of proof.

591. But the judgment of a tribunal of competent jurisdiction, may be null and void in itself in respect of what is contained in it. (t) 1. When the object of the decision it pronounces is uncertain—"Sententia debet esse certa:—*e. g.* a judgment condemning the defendant to pay the plaintiff what he owes him, would be void; though it would be sufficient if it condemned the defendant to pay what the plaintiff demanded of him, and the cause of demand appeared on

(p) 2 Smith, Lead. Cas. 661, 664 *supra*, § 292.

*et seq.* 5th Ed.; per De Grey, C. J., (s) Bk. 1, pt. 1, §§ 88, 90.

in the Duchess of Kingston's case, 11 (t) 1 Ev. Poth. Part 4, ch. 3, sect. 3, St. Tr. 261; B. N. P. 231-2. Art. 2, § 1, n. 18. See also per Parke,

(q) 3 Benth. Jud. Ev. 431-2.

B., in R. v. Blakemore, 2 Den. C. C.

(r) Bk. 1, pt. 1, §§ 87 *et seq.* and 420, 421.

<sup>1</sup> Bradley v. Johnson, 49 Ga. 412; Geary v. Simmons, 39 Cal. 224; Cannon v. Brume, 45 Ala. 262; Spencer v. Dearth, 43 Vt. 98; Phelan v. Gardner, 43 Cal. 306; Shepardson v. Cary, 29 Wis. 34; Rogers v. Higgins, 57 Ill. 244; Chesapeake, &c. Co. v. Gittings, 36 Md. 276. Held applicable under certain circumstances as to a justice's court. Gates v. Preston, 41 N. Y. 113. A judgment binds not only the parties to it, but all persons claiming under it, and is also binding upon privies in interest, law, or estate. Finney v. Boyd, 26 Wis. 366. A person who actively prosecutes the action, is bound by the judgment, though not technically a party thereto. Stoddard v. Thompson, 31 Iowa, 80.

the record of the proceedings. (*u*)<sup>1</sup> 2. When the object of the adjudication is anything impossible. (*x*)—"Lex non cogit impossibilia." (*y*) 3. When a judgment pronounces anything which is expressly contrary to the law, *i. e.*, if it declares that the law ought not to be observed: if it merely decides that the case in question does not fall within the law, though in truth it does so, the judgment is not null, it is only improper, and consequently can only be avoided by the ordinary course of appeal. (*z*) 4. When a judgment contains inconsistent and contradictory dispositions. (*a*) 5. When a judgment pronounces on what is not in demand. (*b*)—"Judex non reddit plus, quam quod petens ipse requirit," and "Droit ne done plus que soit demande." (*c*)<sup>2</sup>

The same principles apply to other things which partake of the nature of judgments. Thus a verdict that finds matter uncertainly or ambiguously is sufficient; (*d*) and the same holds when it is inconsistent. (*e*) In the 11 Hen. IV. 2 A. pl. 3, on the trial of a writ of conspiracy against two, the jury found one guilty and the other not; whereupon the presiding judge (*f*) said to them, "Vous gents, v̄re verdict est contrariant en luy m̄, car si l'un ne soit my culp̄, ambid̄ sont de rien culp̄, p̄ c̄ q̄ le b̄re supp̄ q̄ ils conspir̄ ensemble,

(*u*) 1 Ev. Poth. *in loc. cit.*

(*x*) Id. n. 21.

(*y*) Hob. 96.

(*z*) 1 Ev. Poth. *in loc. cit.* n. 22.

(*a*) Id. n. 23; Cooper v. Langdon, 10 M. & W. 785.

(*b*) 1 Ev. Poth. *in loc. cit.* n. 24.

(*c*) 2 Inst. 286.

(*d*) Co. Litt. 227 a.

(*e*) 48 Edw. III. 25 a; Hob. 262.

(*f*) The book says Thir. Qu. Thirning, C. J., or Thirwit, J.? Both seem to have been on the bench at that time. See Dugdale, Orig. Jud.

<sup>1</sup> Or when matters are embraced which have transpired since the former proceeding. Dyer v. Goran, 29 Iowa, 126.

<sup>2</sup> A judge does not render judgment for more than is demanded.

chesc̄ ove aut̄, mes pur ce quē vous n'estes appritz de ley, soit melior avis de v̄re verdit, &c." So if a verdict pronounces on what is not in issue, (*g*) A verdict concluding against law is void; (*h*) but when a jury find matter of fact and conclude against law, the verdict is good and the conclusion ill. (*i*) And, lastly, of awards. It is a principle that awards must be certain; (*k*) and if an award contains inconsistent provisions, (*l*) or directs what is impossible, (*m*) or what is illegal, (*n*) it can not be enforced by action, and may be set aside on motion.

592. "Cum quæritur," again to quote from the Digest, (*o*) "hæc exceptio" (scil. rei judicatæ) "noceat, necne? inspiciendum est, an idem corpus sit; quantitas eadem, idem jus; et an eadem causa petendi, et eadem conditio personarum; quæ nisi omnia concurrent, alia res est." First, then, in order to exclude a party whose demand has been dismissed, from making a fresh demand, on the ground that the matter is *res judicata* the thing demanded must be the same. But this must not be understood too literally. For instance, although the flock which the plaintiff demands now, does not consist of the same sheep as it did at the time of the former demand, the demand is held to be for the same thing, and therefore is not receivable. (*p*) And so, a party is held to demand the same thing when he demands anything which forms a part of

(*g*) 1 León. 67, pl. 86; Hob. 53; 1 Rol. 257.

(*h*) 22 Ass. pl. 60; 28 Id. pl. 4; Hob 112-13.

(*i*) Plowd. 114; Dy. 106 b, pl. 20; 194 a, pl. 32; Jenk. Cent. 1, Cas. 35; 4 Mod. 10.

(*k*) Watson, Awards, 204, 3rd Ed.; Russ. Arbitr. 275, 3rd Ed.

(*l*) Id. 289.

(*m*) Id. 288; Wats. Awards, 234, 3rd Ed.

(*n*) Russ. Arb. 391, 3rd Ed.; Wats. Awards, 234, 3rd Ed.

(*o*) Dig. lib. 44, tit. 2, ll. 12, 13, 14. See also 1 Ev. Poth. Part 4, ch. 3, sect. 3, art. 4, n. 40; Bonnier, Traité des Preuves, § 683; Code Civil, liv 3, tit. 3, ch. 6, sect. 3.

(*p*) 1 Ev. Poth, 552.

it. (q) <sup>1</sup> But, secondly, in order that the maxim, *res judicata*, shall apply, there must be "*eadem conditio personarum*." And therefore, as we have seen, if the person whom it is sought to affect by a judgment, was neither party nor privy to the proceedings in which it was given, it is not in general even receivable in evidence against him. (r) So a judgment against a party in a criminal case, is not evidence against him in a civil suit, even of the fact on which the conviction must have proceeded. (s) Nor is a judgment of acquittal evidence in his favor; (t) for the parties are not the same. So, in an appeal of murder, the indictment was not evidence against the defendant. (u) And so, on an indictment against A., for perjury committed by him on the trial of an indictment against B.; the record of the proceedings at that trial, with the finding of the jury, and the judgment of the court, pronounced thereon in accordance with the evidence then given by A., is no defense. (x) <sup>2</sup>

**593.** An important exception to this rule exists in the case of judgments *in rem*, *i. e.*, adjudications pronounced upon the status of some particular subject matter, by a tribunal having competent authority for

(q) *Id.*

(r) *Supra*, § 590.

(s) Per Blackburn, J., delivering the opinion of the Judges (in *Dom. Proc.*) in *Castrique v. Imrie*, L. Rep., 4 Ap. Ca. 414, 434. See *Tayl. Ev.* § 1505, 4th Ed.; *Stark. Ev.* 361, 4th Ed.; 2 *Phill. Ev.* 27, 10th Ed.

(t) *Tayl. Ev.* § 1505, 4th Ed.; *Stark. Ev.* 332, 4th Ed. "*Acta facta in causa civili, non probant in iudicio criminali.*" *Masc. de Prob. Concl.* 34, n. 1.

(u) *Samson v. Yardly*, 2 Keb. 223.

(x) *Hob.* 201; *Titus Oates' case*, 10 *Ho. St. Tr.* 1136-7.

<sup>1</sup> The identity of the subject-matter of the suit is to be determined, not by the pleadings, but by the records, or by other proof on the trial. *Garrott v. Johnson*, 11 G. & M. 182. *Whitehurst v. Rogers*, 38 Md. 503; *Streeks v. Dyer*, 39 M<sup>424</sup>.

<sup>2</sup> *Bigelow on Estoppel*, p. 33.

that purpose. (*y*) Such judgments the law has, from motives of policy and general convenience, invested with a conclusive effect against all the world. At the head of these stand judgments in the Exchequer, of condemnation of property as forfeited, adjudications of a Court of Admiralty on the subject of prize, &c.<sup>1</sup> In certain instances, also, judgments as to the status or condition of a party, are receivable in evidence against third persons, although they are not conclusive. Thus in an action against an executor sued on a bond of his testator, a commission finding the testator lunatic at the time of the execution of the bond, is *prima facie* evidence against the plaintiff, though he was no party to it. (*z*) And, by analogy to the general rule of *res inter alios acta*, judgments and judicial proceedings *inter alios*, are receivable on questions of a public nature, and in other cases where the ordinary rules of evidence are departed from. (*a*)<sup>2</sup> Judgments not *in rem* are said to be judgments *in personam*. (*b*)

(*y*) 2 Smith, Lead. Cas. 662, 5th Ed. The authority of the tribunal in such cases, is said to rest on the following grounds, viz. :—1st, that the subject-matter should be within the lawful control of the state, under the authority of which the tribunal sits; 2nd that the sovereign authority of that state should have conferred on the tribunal, jurisdiction to decide as to the disposition of the thing; and, 3d, that

the tribunal should act within its jurisdiction. Per Blackburn, J., *Castrique v. Imrie*, L. Rep., 4 Ap. Ca. 414, 429.

(*z*) *Faulder v. Silk*, 2 Campb. 126; *Dane v. Lady Kirkwall*, 3 C. & P. 683.

(*a*) *Supra*, ch. 5, § 510.

(*b*) J. W. Smith, 2 Lead. Cases, 661, 5th Ed., suggests that *inter partes* would be better; but the classification of judgments into those *in rem* and

*Megee v. Beirne*, 39 Pa. St. 50.

<sup>1</sup> And see *Bigelow on Estoppels*, p. 11; *Cooper v. Reynolds*, 10 Wall. 308; *Megee v. Beirne*, 39 Pa. St. 50; *Barber v. Hartford Bank*, 9 Conn. 407; *Myers v. Beeman*, 9 Ired. 116; *Ormond v. Moye*, 11 Ired. 564; *Keiffer v. Ehler*, 18 Pa. St. 388; *Certain Logs of Mahogany*, 2 Sum. 589; *Dow v. Sanborn*, 3 Allen, 181.

**594.** Conclusive judgments are a species of estoppels; seeing that they are given in a matter in which the person against whom they are offered as evidence has had, either really or constructively, an opportunity of being heard, and disputing the case of the other side. There is certainly this difference, that estoppels are usually founded on the voluntary act of a party; whereas it is a *præsumptio juris* that "*judicium redditur in invitum.*" (c)<sup>1</sup> Moreover, when judgment has been obtained for a debt, no other action can be maintained upon it while the judgment is in force, "*quia transit in rem judicatam.*" (d) Like other estoppels by matter of record, and estoppels by deed, judgments, in order to have a conclusive effect, must be pleaded if there be opportunity, otherwise they are only cogent evidence for the jury. (e)<sup>2</sup>

those *in personam*, has been recognized by statute. See 24 & 25 Vict. c. 10, s. 35.

(c) Co. Litt. 248b; 5 Co. 28b; 10 Id. 94b. According to some foreign jurists, judgments partake of the nature of contracts. "Cette importante présomption (autorité de la chose jugée) se rattachant au fond du droit, autant qu'à la preuve, les règles sur l'effet des jugements, c'est à dire sur les personnes et sur les objets aux-

quels elle s'applique, reposent sur les mêmes bases que les règles sur l'effet des conventions. On l'a souvent dit avec raison, *judiciis contrahimus.*" Bonnier, Traité des Preuves, § 680.

(d) Pollexf. 641. See also 6 Co. 46a.

(e) 2 Smith, Lead. Cas. 670, 673, 5th Ed.; and *supra*, ch. 7, sect. 2, § 544.

(f) 14 Hen. VIII. 8a; 39 Hen. VI. 50, pl. 15; 1 Keb. 546.

<sup>1</sup>Judgment, in presumption of law, is given against the party contrary to his own inclination.

<sup>2</sup>The test of the identity (see *ante*, note 1, p. 100), it seems, will be whether the proof which would fully support the one case would support the other. *Gardner v. Buckbee*, 3 Cowen, 121; *Burt v. Sternburgh*, 4 Cow. 559; *Ricker v. Hooker*, 35 Vt. 457; *Perkins v. Walker*, 19 Vt. 144; *Marsh v. Pier*, 5 Rowle, 273; *Norton v. Huxley*, 13 Gray, 285; *Packet Co. v. Sickels*, 5 Wall. 580; *Phillips v. Berick*, 16 Johns. 136. But consult as to what may or may not be estoppel by judgment, *Arnold v. Arnold*, 17 Pick. 4; *Cleaton v. Chambleis*, 5 Rand. (Va., 86; *Clark v. Young*, 1 Cranch 181; *Goodrich v. City of Chi*

**595.** The general maxims of law, "*Dolus et fraus nemini patrocinentur*," (*f*)<sup>1</sup> "*Jus et fraus nonquam cohabitant*," (*g*)<sup>2</sup> "*Qui fraudem fit frustra agit*," (*h*) apply to the decisions of tribunals. (*i*) Lord Chief Justice de Grey, in delivering the answer of the judges to the House of Lords in the *Duchess of Kingston's* case, (*k*) speaking of a certain sentence of a spiritual court, says: "If it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without. Although it is not permitted to show that the court was mistaken, it may be shown that they were misled. Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice." In such cases, as has been well expressed, the whole proceeding was "*fabula, non judicium*." (*l*) And this principle applies to every species of judgment; to judgments of courts of exclusive jurisdiction; (*m*) to judgments in rem; (*n*) to judgments of foreign tribunals, (*o*) and even to judgments of the House of Lords. (*p*)

(*g*) 10 Co. 45a.

(*h*) 2 Roll. 17.

(*i*) 3 Co. 78a; *The Duchess of Kingston's case*, 11 St. Tr. 262; *Brownword v. Edwards*, 2 Vez. 246; *Earl of Bandon v. Becher*, 3 Cl. & F. 479; *Harrison v. The Mayor of Southampton*, 4 De G., M. & G. 148.

(*k*) 11 St. Tr. 262.

(*l*) 4 De G., M. & G. 148. See

*Macqueen, Law of Marriage, Divorce and Legitimacy*, 2nd Ed., p. 68.

(*m*) *Meddomcraft v. Hugenin*, 5 Curt. 403.

(*n*) *In re Place*, 8 Exch. 704, per Parke, B.

(*o*) *Bank of Australasia v. Nias*, 16 B. 717.

(*p*) *Shedden v. Patrick*, 1 Macq. Ho. Lo. Cas. 535.

cago, 5 Wall. 566; *Beere v. Fleming*, 13 Ir. (C. L.) 506; *Norton v. Huxley*, 13 Gray, 285; *Wood v. Jackson*, 8 Wend. 10; *Lawrence v. Hunt*, 10 Wend. 80.

<sup>1</sup> Or, in another form, *Fraus et dolus nemini patroviniari debent* (3 Co. 78)—no one should encourage fraud and deceit

<sup>2</sup> Justice and fraud never agree together.



It is perhaps needless to add, that a supposed judicial record offered in evidence may be shown to be a forgery. (q)

(q) *Noell v. Wells*, 1 Sid. 358.

## CHAPTER X.

## QUANTITY OF EVIDENCE REQUIRED.

|   | PARAGRAPH |
|---|-----------|
| <b>General rule</b> —No particular number of instruments of evidence re-                |           |
| quired for proof or disproof . . . . .  | 596       |
| Almost peculiar to the common law of England . . . . .                                  | 597       |
| Arguments in favor of requiring a plurality of witnesses . . . . .                      | 597       |
| Arguments against it . . . . .  | 597       |
| Origin of the rule . . . . .  | 599       |
| Exceptions justifiable in certain cases . . . . .                                       | 600       |
| Exceptions to the general rule . . . . .  | 602       |
| 1°. At common law . . . . .   | 603       |
| 1. Prosecutions for perjury . . . . .   | 603       |
| Reason usually assigned for this exception . . . . .                                    | 605       |
| True reason . . . . .   | 606       |
| Amount of evidence required from each witness, or proof . . . . .                       | 608       |
| 2. Proof of wills . . . . .   | 611       |
| Trial by witnesses . . . . .  | 612       |
| 4. Claims of villenage or niefty . . . . .  | 614       |
| 2°. Created by statute . . . . .  | 615       |
| 1. Trials for treason and misprision of treason . . . . .                               | 615       |
| Reasons for this alteration of the common law . . . . .                                 | 618       |
| Objections to it . . . . .  | 619       |
| Fallacy of . . . . .  | 619       |
| Two witnesses not requisite to prove collateral matters . . . . .                       | 620       |
| 2. Other statutory exceptions . . . . .   | 621       |
| When two witnesses are required, their credit is to be determined by the jury . . . . . | 622       |

596. The last subject that offers itself to our attention in this part of the work, is the quantity of legitimate evidence required for judicial decision. This is governed by a rule of a negative kind, which, in times past at least, was almost peculiar to the common law of England, (*a*) namely, that in general no particu-

(*a*) The Hindu law seems the reverse of ours;—where the testimony of a single witness is sufficient it is the exception, not the rule. See Translation of Pootee, c. 3, sect. 8, in Halhed's Code of Gentoo Laws.

lar number of instruments of evidence is necessary for proof or disproof,—the testimony of a single witness, relevant for proof of the issue in the judgment of the judge, and credible in that of the jury, is a sufficient basis for decision, both in civil and criminal cases. (*b*) And, as a corollary from this, when there is conflicting evidence, the jury must determine the degree of credit to be given to each of the witnesses; for the testimony of one witness may in many cases, be more trustworthy than the opposing testimony of many. (*c*) The rule has been expressed “ponderantur testes, non numerantur;” (*d*) but “testimonia” or “probationes” would be better than “testes” as it is clearly not confined to verbal evidence. (*e*)<sup>1</sup>

597. We have said that this rule is a distinguishing feature in our common-law system. The Mosaic law in some cases, (*f*) and the civilians and canonists in all, (*g*)

(*b*) See Blackst. Com. 370; Stark. Evid. 827, 4th Ed.; Trials per Pais, 363; Peak's Ev. 9, 5th Ed.; Co. Litt. 6 b; Fost. C. L. 233; 2 Hawk. P. C. c. 25, s. 131, and c. 46, s. 2.

(*c*) Stark. Evid. 832, 4th Ed.

(*d*) Id.

(*e*) “Testimonia ponderanda sunt, non numeranda,” is found in the Scotch law authorities. Halk. Max. 174; Ersk. Inst. bk. 4, tit. 2, § 26.

(*f*) See the next note.

(*g*) Their maxim is well known, “Unius omnino testis responsio non audiatur, etiamsi præclaræ curiæ

honore præfulgeat:” Cod. lib. 4, tit. 20, l. 9, § 1. See also Id. l. 4; Huberus, Præl. Jur. Civ. lib. 22, tit. 5, n. 18; Decretal, Gregor. IX. lib. 2, tit. 20, c. 23; and *supra*, Introd. pt. 2, §§ 66 *et seq.* Bonnier, in his *Traité des Preuves*, § 201, labors hard, and apparently with success, to show that the lawyers of ancient Rome did not establish this rule, which he considers the production of the lower empire. He argues that all the expressions to be found in the *Corpus Juris Civilis* of an anterior date, which seem to require a plurality of witnesses, must be

<sup>1</sup> Witnesses are weighed, not counted: that is, they are to be estimated by the weight or importance of their testimony, rather than by their number. The author suggests that either of the words “testimonia” or “probationes” might be substituted in the maxim for “testes,” as causing it to imply: that the importance of the testimony or proofs offered should be weighed, rather than that its value should be estimated merely by the number of witnesses sworn.

exacted the evidence of more than one witness,—a doctrine adopted by most nations of Europe, and by the ecclesiastical and some other tribunals among us. As might naturally be expected, much has been said and written, and the most opposite views have prevailed, on the merits of the different systems. Those who take the civil-law view contend, that it is dangerous to allow a tribunal to act on the testimony of a single witness—since by this means any person, even the most vile, can swear away the liberty, honor, or life of any one else; they insist on the undoubted truth, that the chance of discrepancy between the statements of two false witnesses, when examined apart, is a powerful protection to the party attacked; and some of them endeavor to place the matter on a *jure divino* foundation, by contending that the rule requiring two witnesses is laid down in Scripture. (*h*) Now we are by no means

understood in the sense of cautions to the judge, and not as positive rules of law. The following passage is certainly very shrewd and forcible: “Ce n’est que sous Constantin que nous voyons l’exclusion,” (of the testimony of a single witness,) “nettement formulée; et encore l’empereur n’en vint il là qu’à la suite d’une première constitution, qui recommandait seulement aux juges d’être circonspects: *Simili modo sanximus*, l. 9, § 1, *Cod. de testib.* (*Cod. lib. 4. tit. 20, 1 9, § 1*, already cited in this note), *ut unius testimonium, nemo judicum in quacunque causâ facile patiaturs admitti. Et nunc manifestè sancimus, ut unius omnino testis responsio non audiaturs, etiamsi præclaræ curiæ honore præfulgeat.* C’est donc au Bas Empire qu’appartient l’introduction de la maxime, *testis unus testis nullus.*” The French author is not peculiar in this view; the same notion as to

the origin of the rule requiring two witnesses, having been advanced long before his time, See Huberus, *Prel. Jur. Civ. lib. 22, tit. 3, 11. 2*; and *supra*, *Introd. pt. 2, § 66.*

(*h*) The civilians and canonists, Mascard. *de Prob. Quæst. 5, 11. 10*; Decretal, Gregor. IX. *lib. 2, tit. 20, cap. 23, &c.*; and, there is reason to believe, our old lawyers, Fortesc. *cc. 31, 32*; 3 *Inst. 26*; Plowd. 8; argument in *R. v. Vaughan*, 13 *Ho. St. Tr. 535*; and their contemporaries; see Waterhouse, *Comm. on Fortesc. pp. 402–403*, and Sir Walter Raleigh’s case, 2 *Ho. St. Tr. 15*; fancied that they saw in Scripture a divine command, to require the testimony of more than one witness *in all judicial proceedings*. On this, Serjeant Hawkins, 2 *P. C. c. 25, s. 131*, very judiciously observes, that the passages in the Old Testament which speak of requiring two witnesses, “concern

prepared to deny, that under a system where the decision of all questions of law and fact is entrusted to a single judge, or in a country where the standard of truth

only the judicial part of the Jewish law which, being framed for the particular government of the Jewish nation, doth not bind us any more than the ceremonial; and that those in the New Testament contain only prudential relief for the direction of the government of the Church, in matters introduced by the Gospel, and no way controul the civil constitution of countries." See also 1 Greenl. Evid. § 260a, note (3), 7th Ed. Not only is the notion of a *jus divinum* on such matters, untenable and absurd under a religion whose Founder declared that his kingdom is not of this world, John xviii. 36, and disclaimed all authority as a judge or divider over men, Luke xii. 14; but it may be questioned whether the passages cited in support of the dogma, really bear it out, when considered in themselves apart from traditions and glosses. The text of the Mosaic code on this subject will be found in Numb. xxxv. 30; Deut. xvii. 6, and Deut. xix. 15; the first two of which prohibit *capital* punishment unless on the testimony of at least two witnesses, and the last directs that "one witness shall not rise up against a man for any iniquity, or for any sin, that he sinneth: at the mouth of two witnesses, or at the mouth of three witnesses, shall the matter be established." In the case also of preappointed evidence by deeds, agreements, &c., it seems to have been customary among the Jews, as among ourselves, to secure the testimony of more than one witness (see Isaiah, viii. 2; Jer. xxxii. 10-13). But nothing in the Old Testament, that we are aware of, gives the remotest intimation that two witnesses were required in civil cases in general; and

there are some passages which seem indirectly to show the reverse. Thus when Moses speaks of civil trespasses in Exod. xxii. 9, he says nothing about any number of witnesses: "For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing, which another challengeth to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbor." The Jews, like the rest of mankind, had their documentary evidence, their real evidence, and their presumptive evidence. In Deut. xxiv. 1, it is provided that a man may put away his wife by giving her a written bill of divorcement, but no mention is made of witnesses to that instrument. So of real evidence in Exod. xxii. 10-13, it is expressly provided, "if a man deliver unto his neighbor an ass, or an ox, or a sheep, or any beast, to keep, &c. And if it be stolen from him, he shall make restitution unto the owner thereof. If it be torn in pieces, then let him bring it for witness, and he shall not make good that which was torn." We also read in another place, "Now this was the manner in former time in Israel concerning redeeming and concerning changing, for to confirm all things: A man plucked off his shoe, and gave it to his neighbor: and this was a testimony in Israel." Ruth, iv. 7. And, lastly, with respect to presumptive evidence, there is one celebrated case in Jewish history which appears to have been decided without any witness at all. We allude to the judgment of Solomon, 1 Kings, iii. 16, *et seq.* Two women with child were delivered in a

among the population is very low, such a rule may be a valuable security against the abuse of power and the risk of perjury: but it is far otherwise where a high

house, in which the narrative expressly states there was no one but themselves at the time. One of the children died; and both women claimed the living child, one accusing the other of having taken it from her as she slept, and put the dead child in its place. Solomon, as is well known, ascertained the truth by ordering the living child to be divided into two parts, and a part delivered to each of the women, to which the pretended mother assented; but the real mother, actuated by her maternal feelings, prayed that, sooner than the child should be slain, he might be given to her adversary.

We may here observe, that if the civilians and canonists considered the laws of Moses obligatory on them in matters of *procedure*, there was a portion of it which they might have copied with advantage. By that law, every Jew, at least when his life or person was in jeopardy, was tried in the face of his countrymen at the gate of his city, and most usually by several of its elders. See Deut. xxi. 19, &c.; xxii. 15; xxv. 7; Ruth, iv. 1-11; Josh. xx. 4; Jer. xxvi. 10, &c.; Amos. v. 10-15, &c. The civilians and canonists entrusted the decision of every cause, to the judgment of a single judge, sitting in secret, acting on evidence taken in secret, and reduced to writing by a subordinate officer, with scarcely a check against misdecision, beyond a tedious and expensive appeal to a superior tribunal, similarly constituted.

The passages in the New Testament which were cited, or more properly speaking tortured, to bear out the dogma requiring a plurality of witnesses, in all cases, are Matt. xviii. 15,

16; John viii. 17; 2 Cor. xiii. 1; 1 Tim. v. 19; Heb. x. 28; but principally the first, respecting which the text of the Decretal runs thus: "Quia non est licitum alicui Christiano, et multò minùs crucis Christi inimico, ut causæ suæ uniur tantùm quasi legitimo testimonio finem imponat: Mandamus, quatenus si inter vos et quoscunque Judæos emerſerit quæstio, in qualibet causâ Christiani, et maxime clerici, non minus quàm duorum vel trium virorum, qui sint probatæ vitæ et fidelis conversationis, testimonium admittatis, juxta illud Dominicum. In ore duorum vel trium testium stat omne verbum. Quia licèt quædam sint causæ, quæ plures, quàm duos exigant testes, nulla est tamen causa, quæ unius testimonio (quamvis legitimo) terminetur." Decretal. Gregor. IX. lib. 2, tit. 20, c. 23. See also c. 4. The passage on which so much stress is here laid is thus given in the Church of England version of the New Testament, which agrees in substance with the Vulgate, "If thy brother shall trespass against thee, go and tell him his fault between thee and him alone: if he shall hear thee, thou hast gained thy brother. But if he will not hear thee, then take with thee one or two more, that in the mouth of two or three witnesses every word may be established." Matt. xviii. 15, 16. Now, besides the answer already from Serjt. Hawkins, it might be sufficient to observe on this passage, that the case put in it is clearly a case of *preappointed* evidence, the marked difference between which and *casual* evidence has been pointed out, *supra*, Introd. pt. 1, § 31, and pt. 2, § 60; so that, even supposing the command to affect

standard of truth prevails, and facts are tried by a jury directed and assisted by a judge. Add to this, that the anomaly of acting on the testimony of one person is more apparent than real ; for the decision does not proceed solely on the story told by the witness, but on the moral conviction of its truth, based on its intrinsic probability and his manner of giving his evidence. And there are few cases in which the decision rests

municipal law at all, the applying it to every case, civil or criminal, is an unwarrantable extension of the text. But there is another answer, more complete and satisfactory, because applicable to most of the other passages as well as to this. Assuming that the passage, "in the mouth of two or three witnesses every word may be established," is to be understood as recognizing the binding authority of the Mosaic law with respect to witnesses ; the principle of that law, as already shown, was to require more than a single witness, in those cases only where condemnation would be followed by very serious punishment ; and it appears from the following verse of the chapter under consideration, that disobedience to the remonstrance there directed to be made, would be the foundation of further proceedings, ending in the total excommunication of the offending party. The next three passages may be explained in a similar way ; as they all relate to matters where the gravest consequences would follow disobedience, after certain acts had been evidenced in the manner therein stated. In John viii. 17, 18, our Lord shows the Jews that there are two witnesses to the divinity of his mission ; in the 2 Cor. xiii. 1, the Apostle Paul, in order to justify himself in taking severe measures against some of the Corinthians for

disobedience of his injunctions (see ver. 2 and 10), tells them that he was in a condition to prove every word of them by two or three witnesses ; and in the third (1 Tim. v. 19) the same apostle lays down as a rule of ecclesiastical peace, that an accusation should not be received *against an elder* but before two or three witnesses. The remaining passage (Heb. x. 28) is little more than a historical allusion to the Mosaic law on this subject ; and, so far as it goes, rather confirms the views put forward in this note, viz., "He that despised Moses' law died without mercy under two or three witnesses."

Before dismissing this subject, we would direct the attention of our readers to the word "*virorum*," in the above Decretal ; which was evidently inserted to exclude the testimony of *women*, whose evidence was so much suspected by the civilians : *vide supra*, *Intro. pt. 2, § 64*. It is perhaps needless to add, that none of the passages of Scripture which have been referred to make any such distinction. Indeed in John viii. 17, already cited, the expression is *ἀνθρώπων*, not *ἀνδρῶν*. The motion may have had its origin in an apparently spurious law attributed to Moses by Josephus : *Antiq. Judæac. lib. 4, c. 8, n. 15* ; for which see *Intro. part 2, § 64*.

even on these circumstances alone; they are usually corroborated by the presumption arising from the absence of counterproof or explanation, and in criminal cases by the demeanor of the accused while on his trial; for the observation of Beccaria must not be forgotten, "imperfect proofs, from which the accused might clear himself, and does not, become perfect." (i) Still, however, on the trial of certain accusations, which are peculiarly liable to be made the instruments of persecution, oppression, or fraud; and in certain cases of preappointed evidence (where parties about to do a deliberate act, may fairly be required to provide themselves with any reasonable number of witnesses, in order to give facility to proof of that act); the law may with advantage relax its general rule, and exact a higher degree of assurance than could be derived from the testimony of a single witness. (j)

598. On the other hand, however, as the requiring a plurality of witnesses, clearly imposes an obstacle to the administration of justice, especially where the act to be proved is of a casual nature; above all where, being in violation of law, as much clandestinity as possible would be observed, it ought not to be required without strong and just reason. Its evils are these: 1. It offers a premium to crime and dishonesty: by telling the murderer and felon that they may exercise their trade, and the knave that he may practice his fraud, with impunity, in the presence of any one person; and the unprincipled man that he may safely violate any engagement, however solemn, contracted under similar circumstances. 2. Artificial rules of this kind hold out a temptation to the subornation of perjury, in order to obtain the means of complying with

(i) Beccaria, *Dei Delitti et delle Pene*, s. 7. See also, per Abbott, C. J., in *R. v. Burdett*, 4 B. & A. 161-2.

(j) See *infra*.



them. 3. They produce a mischievous effect on the tribunal, by their natural tendency to re-act on the human mind; and they thus create a system of mechanical decision, dependent on the number of proofs, and regardless of their weight. (*k*)

599. But whether the common-law rule had its origin in these considerations is doubtful. Our old lawyers do not seem to have been emancipated from the civil and canon law notion, that two witnesses ought to be required in all cases, based as this notion was then supposed to be, on the authority of Scripture, and fortified by the practice of the church. (*l*) But as in those times the jury were themselves a species of witnesses, and might, if they chose to run the risk of an attain, find a verdict without any evidence being produced before them, (*m*) our ancestors considered that a judgment founded on the verdict of twelve men was a virtual compliance with, what they deemed, a divine command. One strong proof of this is, that where the trial was without a jury, namely, on a trial by witnesses, the rule of the civil and canon law was thought binding and two witnesses were exacted. (*n*)

600. Some modern jurists, not satisfied with condemning the civil law for requiring at least two witnesses in all cases, attack ours for not going far enough in the opposite direction, and would abolish the exceptions to the rule which declares the testimony of one to be sufficient. At the head of these stands Bentham, (*o*) whose arguments have been considered in the Introduction; (*p*) but who, after all, admits, what indeed it would be difficult to deny, that requiring the second

(*k*) Introd. pt. 3, § 69.

(*l*) *Supra*, § 597, note (*k*).

(*m*) Bk. 1, pt. 2, § 119.

(*n*) *Infra*.

(*o*) 4 Benth. Jud. Ev. 503; 5 Id. 463 *et seq.*

(*p*) Pl. 2, § 53.

witness is, to a certain extent at least, a protection against perjury. (*q*)

**601.** On the whole, we trust our readers will agree with us in thinking, that any attempt to lay down a universal rule on this subject, which shall be applicable to all countries, ages, and causes, is ridiculous: and that, although so far as this country is concerned, the general rule of the common law,—that judicial decisions should proceed on the intelligence and credit, and not on the number of witnesses examined or documents produced in evidence,—is a just one; (*r*) there are cases where, from motives of public policy, it has been wisely ordained otherwise.

**602.** Of the exceptions to the general rule respecting the sufficiency of one witness, some exist by the common law, but by far the greater number have been introduced by statute.

**603.** 1°. Exceptions at common law. 1. The most remarkable and important of these is in the case of prosecutions for perjury. (*s*) We speak of this as an exception established by common law, because it is generally so considered, and certainly does not appear to have been introduced by statute. But whether our law has always required the testimony of two witnesses to be given to the judge and jury on a charge of perjury, may be questioned, as most of our early text writers are silent on the subject. (*t*) Fortescue, indeed, (*u*) says, "*Qui testes de perjurio convincere satagit, multo illis plures producere necesse habet,*"—a passage transcribed

(*q*) 5 Benth. Jud. Ev. 468.

(*r*) An eminent French jurist of our day calls it "*vérité de sens commun, qu'il faut peser les témoignages et non les compter.*" Bonnier, *Traité des Preuves*, § 198. •

(*s*) 4 Blackst. Com. 358; 2 Ev.

Poth. 280; 2 Stark. Ev. 859, 3rd Ed.; R. v. Muscot, 10 Mod. 192; Fanshaw's case, Skinn. 327; R. v. Brough-ton, 2 Str. 1229, 1230.

(*t*) See 2 Hawk. P. C. c. 46, s. 2, and c. 25, s. 131 *et seq.* &c.

(*u*) Fortesc. de Laud. c. 32.

without comment by Sir Edward Coke, (*x*) but the context of which renders it doubtful whether, when the Chancellor wrote these words, he meant to express a legal rule. A stronger argument may be derived from the well known practice in attain, that a jury of twelve men could only be attainted of false verdict by a jury of twenty-four. But, on the other hand, we must recollect that in early times the jury themselves were looked on as witnesses, (*y*) who might convict of perjury, or, indeed, of any offense, on their own knowledge without other testimony. *R. v. Muscot* is the leading case on this subject. (*z*) That was an indictment for perjury; and Parker, C. J., in summing up, is reported to have said: (*a*) "There is this difference between a prosecution for perjury, and a bare contest about property, that in the latter case the matter stands indifferent; and therefore, a credible and probable witness shall turn the scale in favor of either party; but in the former, presumption is ever to be made in favor of innocence; and the oath of the party will have a regard paid to it, until disproved. Therefore to convict a man of perjury, a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant, for else there is only oath against oath." Now the book called "The Modern Reports" is not of very high authority; but even supposing the utmost accuracy in the above report, there is nothing in Chief Justice Parker's charge inconsistent with the supposition, that his observations were made in the way of prudential advice and direction to the jury, and not with the view of laying down an imperative rule of law; and this supposition is in some degree confirmed by the comparison with

(*x*) 3 Inst. 163.

(*y*) *Supra*, bk. 1, pt. 2, § 119.

(*z*) 10 Mod. 192, Mich. 12 Ann.

(*a*) *Id.* 194.

which he sets out, between the proof in perjury and that in civil cases.

**604.** The rule requiring two witnesses in indictments for perjury, applies only to the proof of the falsity of the matter sworn to by the defendant:—all preliminary or collateral matters; such as the jurisdiction and sitting of the court, the fact of the defendant having taken the oath, together with the evidence he gave, &c., may be proved in the usual way. (*b*)

**605.** The reason usually assigned in our books for requiring two witnesses in perjury,—viz. that the evidence of the accused having been given on oath, when nothing beyond the testimony of a single witness is produced to falsify it, there is nothing but oath against oath, (*c*)—is by no means satisfactory. All oaths are not of equal value; for the credibility of the statement of a witness, depends quite as much on his deportment when giving it, and the probability of his story, as on the fact of it being deposed to on oath; and, as is justly remarked by Sir W. D. Evans, the motives for falsehood in the original testimony or deposition, may be much stronger with reference to the event on the one side, than the motives for a false accusation of perjury on the other. (*d*) In many cases, even of the most serious kind, tribunals are compelled to decide on the relative credit of witnesses, who swear in direct contradiction to each other. Where, for instance, a murder or larceny is proved by one or more witnesses, and an alibi, or other defense wholly irreconcilable with their evidence, and incon-

(*b*) Tayl. Ev. § 880, 4th Ed.; 2 Gr. Ru-s. 654.

(*c*) 4 Blackst. Com. 358; Peake's Ev. 9, 5th Ed.; 3 Stark. Ev. 859, 3rd Ed.;

3 Gr. Russ, 77-78, 4th Ed.; R. v Harris, 5 B. & A. 939, note.

(*d*) 2 Ev. Poth. 280.

sistent with any hypothesis of mistake, is proved by a like number produced by the accused ; the verdict of the jury may, virtually, though not formally, determine that one set of witnesses or the other has committed perjury.

606. The foundations of this rule, we apprehend, lie much deeper. The legislator dealing with the offense of perjury, has to determine the relative weight of conflicting duties. Measured merely by its religious or moral enormity, perjury, always a grievous, would in many cases be the greatest of crimes, and as such be deserving of the severest punishment which the law could inflict. But when we consider the very peculiar nature of this offense, and that every person who appears as a witness in a court of justice, is liable to be accused of it by those against whom his evidence tells,—who are frequently the basest and most unprincipled of mankind ; and when we remember how powerless are the best rules of municipal law without the co-operation of society to enforce them ; we shall see that the obligation of protecting witnesses from oppression, or annoyance, by charges or threats of charges of having borne false testimony, is far paramount to that of giving even perjury its deserts. To repress that crime, prevention is better than cure ; and the law of England relies, for this purpose, on the means provided for detecting, and exposing the crime at the moment of commission,—such as publicity, cross-examination, the aid of a jury, &c. ;—and on the infliction of a severe, though not excessive punishment, wherever the commission of the crime has been clearly proved. (e) But in order to

(e) We have not overlooked the vexatious question, whether the taking away life by false testimony is punishable capitally by English law ; on which subject see *Fost. Cr. Law*, 131, 132 ; 19 *Ho. St. Tr.* 810 note ; 4 *Blackst.*

carry out the great objects above mentioned, our law gives witnesses the privilege of refusing to answer questions which tend to criminate, or to expose them to penalty or forfeiture; (*f*) it allows no action to be brought against a witness, for words written or spoken in the course of his evidence; (*g*) and it throws every fence round a person accused of perjury. Besides great precision is required in the indictment; the strictest proof is exacted of what the accused swore; and lastly, the testimony of at least two witnesses must be forthcoming to prove its falsity. The result according is that in England little difficulty, comparatively speaking, is found in obtaining voluntary evidence for the purposes of justice; and although many persons may escape the punishment awarded by law to perjury, instances of erroneous convictions for it are unknown, and the threat of an indictment for perjury is treated by honest and upright witnesses as a brutum fulmen.

**607.** This view of the policy of our law, is supported

Comm. 138 and 139; and 196, with note (4) of Professor Christian. Supposing the affirmative, it could only be by an indictment, not for perjury, but for murder, with, previous to the 14 & 15 Vict. c. 100, s. 4, the false oath laid as the means of death; for it is clear that no capital indictment could be framed for bearing false witness with intent to murder, where no conviction of the innocent party ensued. And as in all cases of homicide, the death of the deceased must be clearly and unequivocally traced to the act of the accused, no such indictment for murder could be sustained, if any other evidence, certainly if any other material evidence besides that of the accused, were given on the former trial; for it would be impos-

sible to measure the effect of his testimony on the mind of the tribunal. Indeed in most, if not in all such unhappy cases, more or less blame rests with the tribunal, in rashly giving credit to the false evidence; and of this opinion are said to have been the old Gothic law givers, who under such circumstances punished both the witness and the judge, and, to make all sure, the prosecutor. See 4 Blackst. Comm. 196.

(*f*) Bk. 2, pt. 1, ch. 1.

(*g*) *Dawkins v. Lord Rokeby*, L. Rep., 8 Q. B. 255; *Henderson v. Broomhead*, 4 H. & N. 569; *Revis v. Smith*, 18 C. B. 126; *Collins v. Cave*, 4 H. & N. 235; affirm. on error, 6 Id. 131.

by the history of legislation on the subject of perjury. The law of the Twelve Tables at Rome, recognizing the impossibility of dealing with this offense according to its guilt in foro cœli, laid down, "Perjurii pœna divina, exitium; humana, dedecus;" (*h*) and according to the Digest, "Qui falso vel varie testimonia dixerunt, vel utrique parti prodiderunt, à judicibus competenter puniuntur." (*i*) The legislators of the middle ages, at least in this country, took, as might be expected, the higher and more violent view of the matter; the punishment of perjury being anciently death, afterwards banishment, or cutting out the tongue, then forfeiture of goods. (*k*) But experience probably showed the folly and danger of such penalties for this offense, as its punishment was in time reduced to what is now the punishment for perjury at common law, viz. fine and imprisonment; (*l*) to which was added, until the 6 & 7 Vict. c. 85, the disability to bear testimony in any legal proceeding; and, lest this should be thought too light, Sir Edward Coke observes, (*m*) "Testis falsus non erit impunitus. (*n*) Nocte dieque suum gestat sub pectore testem: (*o*) his conscience always gnawing and vexing him." The spirit of modern legislation is in accordance. The 5 Eliz. c. 9, inflicted fine, imprisonment, and the pillory (the latter of which was abolished by 7 Will. 4 & 1 Vict. c. 23); and the 2 Geo. 2, c. 25, s. 2, allowed a limited period of transportation; for which penal servitude for a term of years has been substituted by more recent enactments. And this is now the severest punishment that can be inflicted for perjury. The power of summarily committing false witnesses to take their

(*h*) 4 Blackst. Com. 139

(*i*) Dig. lib. 22, tit. 5, l. 16.

(*k*) 3 Inst. 163; 4 Blackst. Com.

138.

(*l*) Id.

(*m*) 4 Inst. 279.

(*n*) Prov. xix. 5.

(*o*) Juvenal, Sat. 13, v. 198.

trial for perjury, is vested in tribunals by some modern statutes, especially the 14 & 15 Vict. c. 100, s. 19 although a similar power existed by the common law. (*p*) This is all the change that has been made for several centuries in the punishment of perjury, although death was so frequently inflicted, both by common and statute law, for many offenses falling infinitely short of it in religious and moral enormity.

608. It is not easy to define the precise amount of evidence required, from each of the witnesses or proofs in such cases. Indeed, as was well observed by a very learned judge, (*q*) any attempt to do so would be illusory. Mr. Starkie, in his *Treatise on Evidence*, (*r*) informs us that he heard it once held by Lord Tenterden, that the contradiction of the evidence given by the accused must be given by two direct witnesses; and that the negative, supported by one direct witness and by circumstantial evidence, would not be sufficient; and allusion to a ruling of that sort was made by Coleridge, J., in a case before him. (*s*) But this decision, if it ever took place, is most certainly not law. It would be a startling thing to proclaim, that if a man can elude all direct, he may defy all circumstantial evidence, and commit perjury with impunity; and we accordingly find a contrary doctrine laid down in a variety of cases. (*t*) Again, some modern authorities express themselves as though it would be sufficient, if one witness were to negative directly the matter sworn to by the defendant; and some material circumstances were proved by another witness, in confirma-

(*p*) *Hudson's case*, Skinn. 79.

(*q*) *Per Erle, C. J., R. v. Shaw*, 10 Cox, C. C. 66, 72.

(*r*) 3 Stark. Ev. 860, n. (*q*), 3rd Ed.

(*s*) *Champney's case*, 2 Lew. C. C.

(*t*) See 3 Gr. Russ, 78, *et seq.*, 4th Ed., and the case cited *infra*. The same was also laid down by Cresswell, J., in *R. v. Young*, Kent Sum. Ass. 1873, MS.



tion or corroboration of his testimony. (u) So that, according to this view, it would only be necessary to corroborate the testimony of the direct witness, in the same manner as judges are in the habit of requiring the testimony of an accomplice to be corroborated; or as the testimony of a woman must be corroborated, who seeks to fix a man with the maintenance of a bastard child. (v)

609. It becomes, therefore, a question whether the old rule and reason of the matter are satisfied, unless the evidence of each witness has an existence and probative force of its own, independent of that of the other; so that, supposing the charge were one in

(u) 1 Greenl. Ev. § 257, 7th Ed.; Tayl. Ev. § 876, 7th Ed.; R. v. Gardiner, 8 C. & P. 739; R. v. Yates, C. & Marsh. 159.

(v) The difference between requiring the evidence of *two witnesses* in support of a particular fact, and permitting it to be proved by the evidence of *one witness corroborated by that of another*, has been repeatedly recognized by the legislature, *e.g.*, in the 7 & 8 Vict. c. 101, s. 6, and the 8 & 9 Vict. c. 10, s. 6, where it is enacted, that no order in bastardy shall be made, unless the evidence of the mother of the child "shall be corroborated in some material particular by other testimony, to the satisfaction of the court:" and similar words are used in the 32 & 33 Vict. c. 68, s. 2. On the other hand, there are cases in which, in language equally explicit, the positive testimony of two witnesses is required, in order to fix a party with an offense. Thus the 1 Edw. 6, c. 12, s. 22, says, that the prisoner shall "be accused by two sufficient and lawful witnesses;" the 5 & 6 Edw. 6, c. 11, s. 12, says, he "shall be accused by two lawful accusers;" the 7 & 8 Will.

3, c. 3, s. 2, says, he shall be condemned "upon the oaths and testimony of two lawful witnesses;" and the 11 & 12 Vict. c. 12, s. 4, that he shall not be condemned unless the words spoken "shall be proved by two credible witnesses." And the following case will show, that the one mode of proof, is by no means the equivalent of the other. Suppose an assignment of perjury, that on the trial of A. for stealing the goods of B., the defendant falsely swore that, at such a time, he saw A., at C., take and carry away those goods; and in order to prove the falsity of this, D. and E. were called as witnesses; D. to show that, at the time mentioned, the defendant was at F.; and E. to show that A. was, at that time, at G.; this evidence, if believed, would be sufficient to support the charge of perjury (see per Patteson, J., in R. v. Roberts, 2 Car. & K. 614; and per Byles, J., in R. v. Hook, 1 Dears. & B. 606); and yet it is obvious, that one of these alibis might be false and the other true,—so that the evidence of E. does not necessarily or at least not directly, *corroborate* that of D., or vice versa.

which the law allows condemnation on the oath of a single witness, the evidence of either would form a case proper to be left to a jury; or would at least raise a strong suspicion of the guilt of the defendant. And by analogy to this, where the evidence is—as it undoubtedly may be by law—wholly circumstantial, whether enough must not be proved by each witness to form a case fit to be left to the jury, if the artificial rule requiring two witnesses did not intervene; or whether it would be sufficient, if the evidence on one witness were such as to raise a violent presumption of guilt, and that of another, to raise a reasonable suspicion of it.—“*Præsumptio violenta valet in lege.*” (x) <sup>1</sup>

**610.** To test this view of the law by the decisions and language of judges. In *R. v. Parker*, (y) Tindal, C. J., says, “With regard to the crime of perjury, the law says, that where a person is charged with that offense, it is not enough to disprove what he has sworn, by the oath of one other witness; and unless there are two oaths, or there be some documentary evidence, or some admission, or some circumstances to supply the place of a second witness, it is not enough.” In *Champney’s case*, (z) Coleridge, J., said, that “one witness in perjury is not sufficient, unless supported by circumstantial evidence of the strongest kind; indeed Lord Tenderton, C. J., was of opinion, that two witnesses were necessary to a conviction;” and the reporter adds that the doctrine of *Champney’s case* was ruled by the same judge in a case of *R. v. Wigley*. In *R. v. Yates*, (a) Coleridge, J., also said, “the rule that the testimony of a single witness is not sufficient to sustain an indictment

(x) *Jenk. Cent.* 2, c. 3; see *Co. Litt.*(z) 2 *Lew. C. C.* 258.6 b and *supra*, ch. 2, § 317.(a) *C. & Marsh.* 139.(y) *C. & Marsh.* 646.<sup>1</sup> Strong presumption avails in law.

for perjury, is not a mere technical rule, but a rule founded on substantial justice ; and evidence confirmatory of that one witness, in some slight particulars only, is not sufficient to warrant a conviction." In *R. v. Gardiner*, (*b*) the defendant was indicted for perjury, in falsely deposing before a magistrate that the prosecutor had had a venereal affair with a donkey, and that the defendant saw that the prosecutor had the flap of his trousers unbuttoned and hanging down, and that he saw the inside of the flap. To disprove this the prosecutor and his brother were examined. The former negatived the whole statement of the defendant ; and both witnesses stated that they went to the field mentioned in the deposition ; and that the prosecutor parted from the brother to see whether the donkey, which was full in foal, was able to go a certain distance ; that he was absent about three minutes ; and that the trousers he had on, which were produced, had no flap. On this Patteson, J., said, "I think that the corroborative evidence is quite sufficient to go to the jury." Here was an important piece of real evidence spoken to by two witnesses. In the case of *R. v. Roberts*, (*c*) also, the same judge said, "If the false swearing be, that two persons were together at a certain time ; and the assignment of perjury be, that they were not together at that time ; evidence by one witness that at the time named the one was at London, and by another witness that the other was at York, would be sufficient proof of the assignment of perjury." And, lastly, in *R. v. Mayhew*, (*d*)—where the defendant, an attorney, was indicted for perjury in an affidavit made by him in opposition to a motion to refer his bill of costs for taxation,—one witness was called to prove the perjury ; and in lieu of a second,

(*b*) 8 C. & P. 737.

(*d*) 6 C. & P. 315.

(*c*) 2 Car. & K. 614.

it was proposed to put in the defendant's bill of costs which he had delivered. On this being objected to, Lord Denman, C. J., said, "I have quite made up my mind that the bill delivered by the defendant is sufficient evidence; or that even a letter, written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness." Sir W. D. Evans tells us that he recollects having seen this principle acted on in practice in his time: (*e*) though there is an old case in *Siderfin* to the contrary. (*f*) The question as to the quantity of evidence required on a prosecution for perjury, was also fully discussed before the Court of Criminal Appeal, in a case of *R. v. Boulter*. (*g*) But that case was disposed of on the special circumstances, without the court laying down any general principle. And probably the soundest view of this subject is that stated by Erle, C. J., in *R. v. Shaw*, (*h*) viz., that the degree of corroborative evidence requisite in such cases, must be a matter for the opinion of the tribunal which tries the case, which must see that it deserves the name of corroborative evidence.

Where the alleged perjury consists in the defendant having sworn contrary to what he had previously sworn on the same subject, the case is not within the rule we have been considering; and the defendant may be convicted, simply upon proof of the contradictory evidence given by him on the two occasions. (*i*)<sup>1</sup>

(*e*) 2 Ev. Poth. 280.

(*h*) 10 Cox. C. C. 66, 72.

(*f*) *R. v. Carr*, 1 Sid. 419; Resol.

(*i*) *R. v. Knill*, 5 B. & Al. 929, n.

3.

(*a*).

(*g*) 2 Den. C. C. 396.

<sup>1</sup> Said Mr. Justice Wayne, in delivering the opinion of the Supreme Court of the United States, in *United States v.*

**611. 2.** The next exception is in the proof of wills attested by more than one witness, in the manner formerly required by the Statute of Frauds, 29 Car. 2,

Wood, 14 Pet. 440: "At first, two witnesses were required to convict in a case of perjury, both swearing directly adversely from the defendant's oath; contemporaneously with this requisition, the larger number of witnesses on one side or the other prevailed; then a single witness, corroborated by other witnesses, swearing by circumstances bearing directly upon the imputed corpus delicti of a defendant, was deemed sufficient. Next, as in the case of *Rex v. Knill*, 5 B. & A. 929 n., with a long interval between it and the preceding, a witness who gave proof only of the contradictory oaths of the defendant on two occasions (one being an examination before the House of Lords, and the other, before the House of Commons), was held to be sufficient, though this principle had been acted on as early as 1764, by Justice Yates (as may be seen in the note to *Rex v. Harris*, 5 B. & A. 937), and was acquiesced in by Lord Mansfield, and Justices Wilmont and Aston. We are aware that in a note to *Rex v. Mayhew*, 6 C. & P. 315, a doubt is implied concerning the case decided by Justice Yates; but it has the stamp of authenticity, from its having been referred to in a case happening ten years afterwards, before Justice Chambre (as will appear by the note in 6 B. & A. 537). Afterwards, a single witness, with the defendant's bill of costs (not sworn to), delivered by the defendant to the prosecutor, was held, in lieu of a second witness, sufficient to contradict his oath; and in that case, Lord Denman says, 'A letter written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness' (6 C. & P. 315). We thus see that this rule, in its proper application, has been expanded beyond its literal terms, as cases have occurred in which proofs have been offered, equivalent to the end intended to be accomplished by the rule." "The principle of the relaxation of the old rule," says Greenleaf (*On Evidence*, § 257), "is merely this, that the evidence must be something more than sufficient to counterbalance the oath of the prisoner, and the legal presumption of his innocence. The oath of the opposing witness, therefore, will not avail unless it be corroborated by other independent circumstances. But it is not precisely accurate to say that these additional circumstances must be tantamount to another witness. The same effect being given to the oath of the prisoner as

c. 3, s. 5, and now by the 7 Will. 4 & 1 Vict. c. 26, and 15 & 16 Vict. c. 24. (*j*) The practice under both these statutes is thus stated in a text-book: "Where an instrument requiring attestation is subscribed by several witnesses, it is only necessary, at law, to call one of them; and the same rule prevails in Chancery, excepting in the case of wills; with respect to which it has for many years been the invariable practice of courts of equity, to require that all the witnesses who are in England, and capable of being called, should be examined. The reasons for this exception appear to be, that frauds are frequently practiced upon dying men, whose hands have survived their heads,—that therefore the sanity of the testator is the great fact to which the witnesses must speak when they come to prove the attestation,—and that the heir at law has a right to demand proof of this fact, from every one of the witnesses whom the statute has placed about his ancestor. These will probably be deemed satisfactory reasons for the rule; but should the soundness of the reasons admit of any doubt, the inflexibility of the rule admits of none,

(*j*) See bk. 2, pt. 3, ch. 1, § 222.

though it were the oath of a credible witness, the scale of evidence is exactly balanced, and the equilibrium must be destroyed by material and independent circumstances before the party can be convicted. The additional evidence need not be such as, standing by itself, would justify a conviction in a case where the testimony of a single witness would suffice for that purpose. But it must be at least strongly corroborative of the testimony of the accusing witness." And see *State v. Hayward*, 1 Nott. & McC. 547; *State v. Molier*, 1 Dev. 263; *State v. Norris*, 9 N. H. 96; *Commonwealth v. Pollard*, 12 Metc. 225; *State v. Wood*, 17 Iowa, 18; *Respublica v. Newell*, 3 Yeates, 407; *State v. Porter*, 2 Hill, 611; *Dodge v. State*, 4 Zab. (N. J.) 455.

and it applies in full force, even to issues which are directed by a court of equity to be tried by a jury. On such occasions, it is usual to say that all the subscribing witnesses must be called, in order to satisfy the conscience of the Lord Chancellor." (k) <sup>1</sup>

612. 3. Another exception to this rule was in the "Trial by witnesses," or, as our old lawyers expressed it, "Trial by proofs," (l)—expressions used in our

(k) Tayl. Ev. § 1652, 4th Ed. See also 2 Ph. Evid. 463, 10th Ed.; Bowman v. Bowman, 2 M. & Rob. 501; McGregor v. Topham, 3 Ho. Lo. Cas. 132.

(l) The existence of this exception to the general rule of evidence having been doubted, and even denied, we propose in this note to lay before our readers the arguments and authorities on the subject. Most of the modern treatises on evidence make no mention of the exception; and in some of the earlier editions of Mr. Phillipps' work (see 7th Ed., A. D. 1829), Shotter v. Friend, Carth. 142, is cited as a ground for its rejection, where Lord Chief Justice Holt is reported to have said, p. 144, although the case did not turn on the point now under consideration, "it was not necessary in any case at common law, that a proof of matter of fact should be made by more

than one witness; for a single testimony of one credible witness was sufficient to prove any fact; and the authorities cited in 1 Inst. 6 b, did not warrant that opinion, which was there founded on them." In the report of the same case in 1 Shower, 158, 172, by the name of Shutter *et ux* v. Friend, the Lord Chief Justice is mentioned as citing, in support of his position, F. N. B. 97, and 23 or 33 Hen. VI. 8 (probably meant for 33 Hen. VI. 8, pl. 23); but on the other hand, Eyres, J., is represented as saying (p. 161), that "where trial is not by jury but *per testes*, there must be two in all cases;" so that the dicta in that case go far to neutralize each other. A third report is to be found in Holt, 752, which, both in the name and substance of the case, agrees with that in Carthew. The authorities cited by the Lord Chief Justice, at the utmost only show,

<sup>1</sup> In New York, the execution of a will may be proved, on a trial at law, by one witness, if he is able to prove its perfect execution. Cornwell v. Wooley, 1 Abb. App. Dec. (N. Y.) 441; S. C. 43 How. Pr. 475. And a will may be sustained, even in opposition to the positive testimony of one or more of the subscribing witnesses swearing that the formalities required by statute have not been complied with, if, from other testimony offered, a court or jury is satisfied that the contrary was the fact. Jackson v. Christman, 4 Wend. 277; Peebles v. Case, 2 Bradf. 226; Chaffer v. Baptist, &c. Society, 10 Paige, 13; Jauncey v. Thorne, 2 Barb. Ch. 40.

books, to designate a few cases which were tried by the judges instead of a jury. It is not easy to fix precisely what these cases were. About one, indeed,

that two witnesses were not required to prove the summons of the tenant in a real action, if indeed they go so far; but they certainly do not in any degree touch the general question; and his attack on those cited in the 1 Inst. seems founded on what is either wrong reference or misprint. That passage (Co. Litt. 6 b) runs thus, "It is to be known, that when a trial is by witnesses, regularly the affirmative ought to be proved by two or three witnesses, as to prove the summons of the tenant, or the challenge of a juror and the like. But when the trial is by verdict of twelve men, there the judgment is not given upon witnesses or other kind of evidence, but upon the verdict; and upon such evidence as is given to the jury, they give their verdict." For this,—in, we believe, all the editions of Coke upon Littleton, certainly both in that of 1633 and the last one of 1832,—are cited *Mirr.* c. 3; *Plowd.* 10; *Bract.* lib. 5, fol. 400. Now the last two of these are wholly irrelevant; and were most probably inserted by mistake for *Plowd.* 8 and *Bract.* lib. 5, fol. 354 b, which are cited by Sir Edw. Coke in 3 Inst. 26, when speaking of two witnesses in cases of treason, and are certainly some authority in his favor; and his remaining quotation, the *Mirror*, c. 3 (see sect. 12), expressly states it to be a good exception of summons, that the party "was not summoned, or not reasonably summoned, or that he received the summons by no freeman, or but by one freeman."

Many other authorities might be cited to establish the position, that two witnesses are required on a trial

by witnesses; and what is more important, they generally agree in the reason for this, namely, the absence of a jury. Thus Lord Chief Baron Gilbert, says, "there are some cases in the law where the full evidence of two witnesses is absolutely necessary; and that is, first, where the trial is by witnesses only, as in the case of a summons in a real action: for one man's affirming is but equal to another's denying, and where there is no jury to discern of the credibility of witnesses, there can be no distinction made in the credibility of their evidence; for the court doth not determine of the preference in credibility of one man to another, for that must be left to the determination of the neighborhood; therefore where a summons is not made and proved by two witnesses, the defendant may wage his law of non-summons, &c." *Gilb. Ev.* 151, 4th Ed. The authority of Coke has been already referred to, and in another part of the 1st Inst. (viz. 158 b) he tells us, that the proof of the summons of the jurors to try an assize must be made by two summoners at the least; for which he cites *Mirr.* c. 2, s. 19, *Bract.* lib. 5, fol. 333, 334, *Fleta*, lib. 6, c. 6, and *Britt.* c. 121. The first of these is irrelevant, and is probably a mistake for *Mirr.* c. 3, s. 12, already mentioned; the other three are all to the effect that there must be two summoners. In *Reniger v. Fogassa*, H. 4 Ed. VI. *Plowd.* 12, Brooke, Recorder of London, says, *arguendo*, "It is true that there ought to be two witnesses at least, where the matter is to be tried by witnesses only, as matters are in the civil law." So in 2 Ro. Abr. 675, Evidence, pl. 5.



there can be no question, viz., where on a writ of dower the tenant pleaded that the husband of the demandant was still living; (*m*) and Finch, (*n*) relying on the obiter dictum of the court in 8 Hen. VI. 23, pl. 7, says that this was the only case in which trial by witnesses was allowed. But other authorities mention several more; *e. g.*, the summons of a tenant in a real action; (*o*) the summons of a juror in an assize, (*p*) and the challenge of a juror; (*q*) and two viewers are said to have been required in an action of waste. (*r*) Mr. Justice Blackstone endeavors to reconcile this discrepancy, by supposing that the plea of the life of the husband in a writ of dower, was the only case in which the direct issue in the cause was tried by witnesses, all the other instances being of collateral matters. (*s*) But it is not quite clear that in ancient times, issue taken on the death of the husband in a *cui in vita*, (*t*) and in some other cases, (*u*) was not tried by witnesses; and with respect to the action of dower, although modern

"Un testimoigne est bone, per Atkins, et Hoke dit doit estre 2 al meins, ou est trie per testimoignez." See also Trials per Pais, 363.

The general opinions of the middle ages, render the existence of the exception in question extremely probable. Our old lawyers were by no means emancipated from the notion, the grounds of which we have examined *supra*, § 597, note (*k*), that the divine law required two witnesses in every case, and that human legislation should be in accordance with it; see in particular, Plowd. 8; Fortescue, cc. 31 & 32; and 3 Inst. 26: but they consider this rule complied with when the issue was determined by a jury, who in early times were a sort of witnesses themselves; see bk. 1, pt. 2, § 119

(*m*) 3 Blackst. Comm. 336; Finch, Law, 423; 8 Hen. VI. 23, pl. 7; 56 Hen. III., cited 2 Rol. Abr. 578, pl. 14.

(*n*) Finch, *in loc. cit.*

(*o*) Co. Litt. 6b; Gilb. Ev, 151, 4th Ed.

(*p*) Co. Litt. 158b.

(*q*) Co. Litt. 63. This probably means, an objection to the sufficiency of the summons of a juror in a real action; see 2 Hawk. P. C. c. 25, s. 131. Certain it is that no such rule is observed in modern practice when a juror is challenged.

(*r*) Clayt. 89, pl. 150.

(*s*) 3 Blackst. Comm. 336.

(*t*) 2 Edw. II. 24, tit. Cui in Vita.

(*u*) See 36 Ass. pl. 6; 39 Id. pl. 9  
30 Id. pl. 26; 43 Id. pl. 26

authorities speak of the above plea as a plea in bar, (*x*) some of the old authorities treat it as a dilatory plea. (*y*) Real and mixed actions are now abolished by 3 & 4 Will. 4, c. 27, s. 36, and 23 & 24 Vict. c. 126, s. 26; but it may be a question whether two witnesses are not still required when, in an action for dower brought in the form given by the latter act, the death of the husband is disputed.

**613.** The evidence on this kind of trial need not be direct—it is sufficient if the witnesses speak to circumstances, giving rise to a reasonable intendment or presumption of the truth of the fact which they are called to prove. (*z*)

**614.** 4. There seems to be some difference among the authorities, as to whether two witness were required on a claim of villenage or niefty. (*a*) If such were the rule, it was a good one in favorem libertatis; but it is needless to pursue the inquiry at the present day.

**615.** We now proceed to the statutory exceptions. Of these the most important and remarkable, is found in the practice on trials for high treason and misprision of treason. The better opinion and weight of authority are strongly in favor of the position, that at the common law a single witness was sufficient in high treason. and a fortiori in petty treason or misprision of treason. (*b*) In the 3 Inst. 26, however, Sir Edward Coke says, "It seemeth that by the ancient common law, one

(*x*) Com. Dig. Pleader, 2 Y. 9; 2 Wms. Saund. 44d, 6th Ed.

(*y*) Bract. lib. 4, c. 7, fol. 301, 302; Dyer, 185a, pl. 65.

(*z*) Thorne v. Rolff, Dyer, 185a, pl. 65; 1 Anders. 20, pl. 42.

(*a*) See Britton, c. 31; 2 Rol. Abr. 675, Evidence, pl. 3; F. N. B. 78, H., and Fitz. Abr. Villenage, pl. 39

(*b*) 2 Hawke, P. C. c. 25, s. 131, and c. 46, s. 2; Foster, Cr. Law, 232; 1 Greenl. Ev. § 255, 7th Ed.; Tayl. Ev. § 869, 4th Ed.; The Case of Clipping, T. Jones, 263; Bro. Abr. Corone, pl. 219; Dyer, 132, pl. 75; Kel. 18 and 49; 1 Hale, P. C. 297-301, 324; 2 Id. 286, 287.

accuser or witness was not sufficient to convict any person of high treason. . . . And that two witnesses be required, appeareth by our books" (here he cites several authorities, all of which relate to the two witnesses required on a trial by witnesses, (c) and have no reference to treason or criminal proceedings), "and I remember no authority in our books to the contrary: and the common law herein is grounded upon the law of God, expressed both in the Old and New Testament; Deut. xvii. xix. 15; Matt. xviii. 16; John xviii. 23 (perhaps meant for John viii. 17); 2 Cor. xiii. 1; Heb. x. 28; 'In ore duorum aut trium testium peribit qui interficietur; Nemo occidatur uno contra se dicente testimonium.'" Now supposing these and similar passages of Scripture to be applicable to municipal law at all, (d) a decisive answer to Sir Edw. Coke is given by Serjeant Hawkins, (e) viz., that his argument proves too much; for that "whatsoever may be said either from reason or Scripture for the necessity of two witnesses in treason, holds as strongly in other capital causes, and yet it is not pretended that there is, or ever was, any such necessity in relation to any other crime but treason." Besides, the authority of some parts of the 3rd Institute has been doubted. (f) Perhaps the hypothesis offered in a former part of this chapter, respecting the origin of the rule requiring two witnesses in perjury, may assist us here also, viz., that our old lawyers considered two-witnesses necessary on all criminal charges, including treason; but deemed this requisite complied with when the trial was by jury, who, in those days, were looked on as witnesses. (g)

616. Taking for granted, then, that, at common

(c) See *supra*, § 612, note (l).

(d) See on this subject *supra*, § 597, note (h).

(e) 2 Hawk. P. C. c. 25, s. 131.

(f) Kely, 49.

(g) *Supra*, § 603.

law, a charge of treason might be maintained on the testimony of a single witness, the statutes on the subject are as follows: The 1 Edw. 6, c. 12, after repealing several statutes by which various treasons and felonies were created, enacts, in its 22nd section, that no person shall be indicted, arraigned, condemned, or convicted for treason, petit treason, misprision of treason, &c., unless he shall be accused by two sufficient and lawful witnesses, or shall willingly without violence confess the same. And by the 5 & 6 Edw. 6, c. 11, s. 12, no person shall be indicted, arraigned, condemned, convicted, or attainted for any treason, &c., unless he shall be accused by two lawful accusers; which said accusers at the time of the arraignment of the party accused, if they be then living, shall be brought in person before him, and avow and maintain what they have to say against him, &c.; unless he shall willingly without violence confess the same. But the subsequent statute, 1 & 2 P. & M. c. 10, s. 7, having directed that all trials for treason should be had and used, only according to the due order and course of the common law, and not otherwise; the judges of those days doubted, or affected to doubt, whether the above mentioned statutes of Edw. VI. were not repealed. The question was raised in several cases, and the doubt finally overruled in the time of Charles II. (*h*)

**617.** Several other points were raised on the construction of those statutes, which are now interesting only as matter of legal history: (*i*) for the modern law on this subject is contained in the statute 7 & 8 Will. 3, c. 3, "For regulating of Trials in cases of Treason and Misprision of Treason." The second section

(*h*) *Fost. C. L.* 237.

(*i*) See *Fost. C. L.* 232-240.

of that statute enacts, "that no person shall be indicted, tried, or attainted, of high treason, whereby any corruption of blood may or shall be made to any such offender, &c., or of misprision of such treason, but by and upon the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the same treason; unless the party indicted and arraigned, or tried, shall willingly, without violence, in open court, confess the same, or shall stand mute, or refuse to plead."

618. Various reasons have been suggested for this alteration of the common law. At the trial of Viscount Stafford, (*j*) in 1680, before the House of Lords, Lord Chancellor Finch, we are informed, "was pleased to communicate a notion concerning the reason of two witnesses in treason, which he said was not very familiar he believed; and it was this. Anciently all or most of the judges were churchmen and ecclesiastical persons, and by the canon law now, and then in use over all the Christain world, none can be condemned of heresy but by two lawful and credible witnesses; and bare words may make a heretic, but not a traitor, and anciently heresy was treason; and from thence the parliament thought fit to appoint, that two witnesses ought to be for proof of high treason." This explanation certainly receives some color from one of the statutes repealed by the 1 Edw. 6, c. 12, namely, the 25 Hen. 8, c. 14, s. 6, which enacted that no person should be presented or indicted of heresy, unless duly accused and detected thereof by two lawful witnesses at the least. But heresy being an ecclesiastical offense, it was reasonable to adopt the ecclesiastical rules of proof when it was made the subject of secular punish-

(*j*) T. Raym. 407, 408.

ment ; besides, it is an offense of a character which would justify the throwing almost any amount of protection round persons accused of it. Others consider the rule based on this—that, the accused having taken an oath of allegiance, where a single witness bears testimony to treason committed by him, there is only oath against oath. (*k*) But this reasoning is far from satisfactory ; for the accused may never have taken an oath of allegiance, and even if he has, all oaths are not observed with equal fidelity. Besides, the 1 Edw. 6, c. 12, extends the rule to cases of petty treason, and to the speaking of certain words, rendered punishable under that act by imprisonment and forfeiture of goods. The true reason for requiring two witnesses in high treason and misprision of treason—unquestionably that which influenced the framers of the modern statutes on the subject, whatever may have been the motives of those of the earlier ones—is the peculiar nature of these offenses, and the facility with which prosecutions for them may be converted into engines of abuse and oppression. (*l*) For although treason, when clearly proved, is a crime of the deepest dye, and deservedly visited with the severest punishment ; yet it is one so difficult to define—the line between treasonable conduct and justifiable resistance to the encroachments of power, or even the abuse of constitutional liberty, is often so indistinct—the position of the accused is so perilous—struggling against the whole power and formidable prerogatives of the crown—that it is the imperative duty of every free state to guard, with the most scrupulous jealousy, against the possibility of such prosecutions being made the means of ruining political opponents. (*m*) With this view the 7 & 8 Will. 3, c. 3

(*k*) 4 Blackst. Comm. 358.

Ev. 152, 4th Ed.

(*l*) 4 Blackst. Comm. 358 ; Gilb.

(*m*) Gilb. Ev. 152, 4th Ed.

besides requiring two witnesses as already stated, enacts, *inter alia*, that no person shall be tried for any of the treasons therein mentioned, except attempts to assassinate the king, unless the indictment be found within three years after the offense committed; (*n*) that the accused shall have a copy of the indictment five days before the trial, (*o*) and a copy of the jury panel two days before the trial. (*p*) And by the 7 Anne, c. 21, s. 11 (in part repealed and re-enacted by 6 Geo. 4, c. 50), a copy of the indictment, a list of the witnesses to be produced, and of the jurors impanelled, are to be delivered to him a certain time before the trial. All these protections have been taken away, by subsequent statutes, from certain cases of treason and misprision of treason, which, though within the letter, are certainly not within the spirit of the former enactments, viz., where the overt acts of treason charged in the indictment are the assassination of the sovereign, or any direct attempt against his life or person. (*q*)

**619.** The principle of the 7 & 8 Will. 3, c. 3, requiring two witnesses in treason, has however been severely attacked. Bishop Burnet, speaking of that statute shortly after it was passed, said the design of it seemed to be to make men as safe in all treasonable conspiracies and practices as possible; (*r*) but he afterwards makes some observations which it would be difficult to reconcile with this language. (*s*) Bentham, as might be expected, strongly condemns it; (*t*) but his chief arguments are directed against the portions now repealed by the 39 & 40 Geo. 3, c. 93, and the 5 & 6

(*n*) 7 & 8 Will. 3, c. 3, s. 6.

(*o*) *Id.* sect. 1.

(*p*) *Id.* sect. 7.

(*q*) 39 & 40 Geo. 3, c. 93, and 5 & 6 Vict. c. 51.

(*r*) Fost. C. L. 221; 5 Benth. Jud.

Ev. 489.

(*s*) Fost. *in loc. cit.* The passages referred to will be found in Burne's History of his own Times, vol. 2, 1, 141, Ed. 1734.

(*t*) 5 Benth. Jud. Ev. 485-495.

Vict. c. 51. (u) He observes, however, that after the passing of this statute, "a minister might correspond (as so many ministers were then actually corresponding) with the exiled king by single emissaries and be safe. . . . As to the other provisions, then, all of them have their merit; some of them were no more than the removal of barefaced injustice; but as to this, it was specially levelled, not against false accusations, but against true ones." (x) In Taylor on Evidence also (y) we find this passage: "A man of calm reflection may think that the legislature would confer no trifling benefit on the country, if it defined the law of treason with greater accuracy, and if, by abolishing alike the cruelties which make it abhorrent, and the protections which make it ridiculous, it rendered the punishment of traitors more certain and less barbarous."

All this reasoning, however, is more specious than sound. It seems based, in some degree at least, on the false principle that has been examined in the Introduction to this work, (z) and which is to be found more or less in every part of Bentham's Treatise on Judicial Evidence, viz., that the indiscreet passiveness of the law is as great an evil as its corrupt or misdirected action; and consequently, that the erroneous conviction and punishment of an innocent, a violent, or even a seditious man, for the offense of treason, works the same amount of mischief as the escape of a traitor from justice, and no more. Besides, the above authors appear to have assumed, that in the case put of ministers corresponding with attainted persons by means of a single emissary, and such like, the incapacity to prosecute for treason involves impunity to the criminal. They forget that

(u) See *supra*, sect. 618, and *infra*, bk. 4, pt. 1, ch. 2.

(x) 5 Benth. Jud. Ev. 490.

(y) Tayl. Ev. sect. 871, 5th Ed.

(z) Introd. pt. 2, sect. 49.



there has always been such an offense as seditious conduct, which, being only a misdemeanor, may be proved by one witness, and which does not merge in the treason. (*a*) And of late years the legislature has created an intermediate offense between treason and sedition, by making various acts, committed against the crown and government of the country, felony, and severely punishable. (*b*) By the law as it stands, persons sometimes escape with a conviction for felony or sedition whose conduct, considered with technical accuracy, amounts to treason. But on the other hand, those who are innocent of that terrible crime lie under no dread of being falsely accused of it; and when a conviction for treason does take place, it is on such unquestionable proof, that the blow descends on the disaffected portion of society with a moral weight, increased a hundredfold by the moderation of the executive in less aggravated cases. The extending the protection to charges of petty treason, as was done by 1 Edw. 6, c. 12, was idle; the 7 & 8 Will. 3, c. 3, it will be observed, avoided that; and the offense itself is now abolished by 9 Geo. 4, c. 31, s. 2.

620. The rule requiring two witnesses in treason, only applies to the proof of the overt acts of treason charged in the indictment—any collateral matters may be proved as at common law; (*c*) such as that the accused is a subject of the British crown, (*d*) and the like. Nor perhaps does it hold on the trial of collateral issues. As, for instance, where a prisoner convicted of treason makes his escape, and on being retaken and brought up to receive judgment, denies

(*a*) 4 Blackst. Com. 119; R. v. Fost. C. L. 240-2; 1 East, P. C. 130.  
Reading, 7 Ho. St. Tr. 265-7.

(*b*) 11 & 12 Vict. c. 12.

(*c*) Tayl. Ev. sect. 872, 4th Ed.;

(*d*) Fost. C. L. 240; R. v. Vaughan,  
13 Ho. St. Tr. 535, per Holt, C. J.

his identity with the party mentioned in the record of conviction. (e) <sup>1</sup>

**621.** There are other statutory exceptions to the

(e) In such cases the prisoner has no peremptory challenge. *Ratcliffe's Case*, Fost. C. L. 42.

<sup>1</sup> In *Burr's Trial*, *Causes Célèbres*, vol. 4, p. 195, Chief Justice Marshall said that "though the constitution declared that two witnesses are necessary to produce conviction (Const. U. S. art. 3, § 3), yet it may not be so strictly and absolutely necessary to authorize an indictment being found a true bill. My present impression is that though there must be two witnesses to the general charge of treason, yet that one witness may be sufficient to prove one act, and another to prove another. . . . The law books made this discrimination between a trial and an indictment." The great trial for treason in the United States is and must continue to be that of Aaron Burr, Ex-Vice President of the United States, begun in the city of Richmond, Friday, May 22nd, 1807, and concluding Tuesday, September 1st, of that year. Never before or since in the annals of the United States has such a court been convened. From the Bench, composed of the venerable Chief Justice Marshall and Judge Griffin, to the counsel engaged, all were men whose learning and eminent talents are historic. A superb and comprehensive report of this memorable trial has been recently published in Cockcroft's "*Causes Célèbres*," vols. IV. and V. (New York, James Cockcroft & Co., 1875). See the Opinion of Marshall, C. J., as to the order of evidence in trials for treason and the overt act, vol. IV., p. 531, and Mr. Martin's argument as to the overt act, reviewing the antecedent authorities, *Id.* p. 321, and particularly the opinion of the Chief Justice, delivered Monday, August 31st, 1807, reported in full, commencing vol. V. p. 495. See also Story on the Constitution, §§ 1796-1803; and as to a definition of treason and of the overt act, Serj. on Const. ch. 30 (2d Ed. ch. 32); *Ex parte Bollman*, 4 Cranch, 75; *People v. Lynch*, 11 Johns. R. 549. And see, as to the portion of the clause requiring two witnesses to the overt act, or a confession in open court, *United States v. Fries* (Pamphlet, p. 171); *Wharton's State Trials*, 486; *United States v. Hoxie*, 1 Paine, 265; *United States v. Hanway*, 2 Wallace, Jr. 139; 2 Bishop on Crim. Law, 1032; 3 Greenleaf on Evidence, § 237; *Boston Law Rep.* (1851), p. 413; Story on the Constitution,

rule in question. By the 7 & 8 Vict. c. 101, s. 3, and 8 & 9 Vict. c. 10, s. 6, already referred to, (f) no order of affiliation shall be made against the putative

(f) *Supra*, sect. 608, n. (v).

§ 1802; Wharton on Crimes, § 2739 (vol. II., 7th Ed.). During and immediately subsequent to the Revolution, trials for treason against a particular State in the Union, were not infrequent. In Pennsylvania, during that war, five persons were executed for the offense. In Massachusetts there were sixteen capital convictions of this crime, arising out of Shay's Rebellion, though there were no executions, and few lengthy imprisonments inflicted. In the *People v. Lynch, Aspinwall, Cornell, and John Hagerman*, 11 Johns. R. 549, the defendant, Mark Lynch, was indicted for furnishing, on the 16th day of May, 1840, and on other days, "with force and arms, upon the high seas, falsely, wickedly . . . give and minister aid and comfort to the subjects of the said king (of Great Britain), by then and there furnishing, supplying, and delivering fifty barrels of beef, fifty barrels of pork, fifty hams, one hundred pounds' weight of butter, and thirty cheeses, to divers subjects of the said king, &c., in and on board a public ship of war belonging to the said king, &c., then and there lying, and being called *The Bulwark*, the said king, &c., and his subjects then and yet being at war with, and enemies of, the said State of New York, against the duty of the allegiance of the said Mark Lynch (and others), and against the form of the statute," &c. The court (Kent, Ch. J.) held that "the offense not being charged as treason against the United States, the present indictment can not be supported, even admitting this court to have jurisdiction." We would barely observe, however, that we think the jurisdiction of the state courts does not extend to the offense of treason against the United States. The judicial power of the United States extends to all cases arising under the constitution and laws of the United States. The declaration of war was by a law of congress, in consequence of which it became criminal in the prisoners to afford aid and comfort to the enemy. And the act establishing the judicial courts of the United States, gives to the circuit courts cognizance, exclusive of the courts of the several states, of all crimes and offenses cognizable under the authority of the United States, except where the laws of the United States otherwise direct (1 Sess. 1 Cong. c. 20, § 11). In whatever

father of a bastard child, unless the evidence of its mother be corroborated in some material particular by other testimony to the satisfaction of the court. So by the 32 & 33 Vict. c. 68, s. 2, which makes the

point of view, therefore, the case is considered, we are satisfied that the present indictment can not be supported." And see Wharton on Crimes, vol. II., 7th Ed., § 2771. The constitutions or statutes of several states declare expressly that treason against the United States shall be cognizable by the state as treason against that state. Where, in case of insurrection or rebellion, any state applies to the United States for the aid guaranteed it in such cases by the constitution, any opposition to the aid so extended will constitute treason against the general government. Wharton on Criminal Law, § 2770 (vol. II., 7th Ed.). Any open and armed opposition to the laws of a state, or a combination and forcible attempt to overturn or usurp the government thereof, is a treason against the particular state. *People v. Lynch*, 11 Johns. 549; per Durfee, C. J., in *Dorr's Case* (Pamphlet); Rawle on the Constitution, 305; Serjeant's Constitutional Law, 382. Tucker, in his note on Treason (4 Tucker's Black. App. 21), says that every constructive or interpretative levying of war against a state, unless the object be for some matter of general concern to the United States, is a treason against the state itself, which view, says Wharton (on Criminal Law, § 2769), was said to have been adopted by Judge Story, in charging a grand jury, during the Rhode Island disturbances, in 1842; and Judge King, charging the grand jury in Philadelphia, at the time of the Kensington riots, said, "that when the object of a riotous assembly is to prevent, by force and violence, the execution of any statute of this commonwealth, or, by force and violence, to coerce its repeal by the legislative authority, or to deprive any class of the community of the protection afforded by law, as burning down all churches or meeting-houses of a particular sect, under color of reforming a public grievance, or to release all prisoners in the public jails and the like, and the rioters proceed to execute, by force, their pre-determined objects and intents—they are guilty of high treason in levying war against the commonwealth." But without clear proof of an intention to overthrow the government, and actual levying of war against the state, the remedy is to indict for a seditious conspiracy (Brackenridge, Misc., 495; Wharton on Criminal Law, § 2769, vol. II., 7th Ed.)

parties to actions for breach of promise of marriage competent to give evidence therein, it is provided that no plaintiff in such action shall recover a verdict, unless his or her testimony shall be corroborated by some other material evidence in support of such promise. And another instance will be found in the 11 & 12 Vict. c. 12, s. 4, which enacts that no person shall be convicted of certain offenses made felony by that statute, "in so far as the same are expressed, uttered, or declared by open or advised speaking, except upon his own confession in open court, or unless the words so spoken shall be proved by two credible witnesses." Seventy-four statutes of this kind are said to have been passed, between the 1 Edw. VI. A. D. 1547) and the 31 Geo III. (A. D. 1791). (*g*)

**622.** Although, as has been shown in the present chapter, the law of this country requires a certain numerical amount of proofs in particular cases, it has avoided the great mistake into which the civilians fell of attaching to those proofs an artificial weight, and leaves their value to the discrimination of a jury. From motives of legal policy, no decision shall in such cases be based on the testimony of a single witness, however credible; but when more are adduced, be the number what it may, their testimony must, if untrustworthy in the eyes of the jury, go for nothing.<sup>1</sup>

(*g*) 5 Benth. Jud. Ev. 483.

<sup>1</sup> The quantity of evidence required in statutory proceedings will be found regulated, in most cases, by the statutes themselves. For careful directions as to the evidence required in proceedings under statutes regulating mechanics' liens, see Guernsey's Mechanics' Lien Law, New York, 1873.

## BOOK IV.

FORENSIC PRACTICE AND EXAMINATION OF  
WITNESSES.

## PART I.

*Forensic Practice with Respect to Evidence.*

|  | PARAGRAPH |
|--|-----------|
| Rules which regulate forensic practice respecting evidence . . . . . | 623       |
| Division . . . . .   | 623       |

623. The rules of evidence, especially such as relate to evidence in causa, are rules of law, which a court or judge has no more right to disregard or suspend, than any other part of the common or statute law of the land. (a) Those which regulate forensic practice are less inflexible : for although the mode of receiving and extracting evidence is governed by established rules, a discretionary power of relaxing these on proper occasions is vested in the tribunal ; and indeed it is obvious, that an unbending adherence under all circumstances, to rules which are the mere *forma et figura judicii*, would impede rather than advance the ends of justice.

The most convenient way of treating the present subject will be, first to describe the course of a trial, and then to examine the practice relative to its principal incidents as connected with the matter before us. But before doing either of these, it is advisable to direct attention to certain proceedings previous to trial.

(a) Bk. I, pt. I, §§ 80, 81, 86, and pt. 2, § 116.

## CHAPTER I.

### PROCEEDINGS PREVIOUS TO TRIAL.

|  | PARAGRAPH |
|--|-----------|
| I. Inspection of documents in the custody or under the control of the opposite party . . . . . | 624       |
| At common law . . . . .  | 624       |
| 14 & 15 Vict. c. 99, s. 6 . . . . .  | 624       |
| II. Discovery, &c. of documents in the possession or power of the opposite party . . . . .     | 625       |
| III. Inspection of real or personal property . . . . .   | 625a      |
| IV. Inspection in the Court of Admiralty . . . . .   | 625b      |
| V. Inspection under patent law—15 & 16 Vict. c. 83, s. 42 . . . .                              | 626       |
| VI. Exhibiting interrogatories to a party in the cause . . . . .                               | 627       |
| VII. Admissions before trial . . . . .   | 630       |

624. The common law laid down as a maxim, “*Nemo tenetur armare adversarium suum contra se* ;” (a)<sup>1</sup> and, in furtherance of this principle, it generally allowed litigant parties to conceal from each other, up to the time of trial, the evidence on which they meant to rely, and would not compel either of them to supply the other with any evidence, parol, or otherwise, to assist him in the conduct of his cause. (b). The maxim, at least when pushed to this extent,

(a) Co. Litt. 36a ; Wing. Max. 665. (b) See per Holt, C. J., 3 Salk. 363.

<sup>1</sup> No man is bound to arm his adversary against himself. And see also the maxims : *Nemo tenetur divinare* (4 Co. 28)—No one is bound to guess or fortell. *Nemo tenetur informare qui nescit, sed quisquis scire quos informat* (Lane, 110)—No one is bound to give information upon a subject with which he is unacquainted : but every one who does give information is bound to be acquainted with his subject. *Nemo tenetur seipsum infortunius et periculis exponere* (Co. Lit. 253)—No one is bound to expose himself to misfortune and dangers.

certainly not stamped with the wisdom which, for the most part, marks the common law; (c) but the defect was in some remedied, by the power which either party had, of filing a bill in equity for the discovery of evidence,<sup>1</sup> a process, however, which

(c) The maxim seems to have been "Nemo tenetur edere instrumenta derived from the Roman law Cod. lib. contra se." Halk. M. 100; Ersk. Inst. 2, tit. 1, l. 4. So in the Scotch law, book 4, tit. 1, § 52.

<sup>1</sup> Chapter VI. of the New York Code of Procedure (now adopted in many of the states) provides that—

§ 389. (Being 343 of 1848.) No action to obtain discovery under oath, in aid of the prosecution or defense of another action, shall be allowed, nor shall any examination of a party be had, on behalf of the adverse party, except in the manner prescribed by this chapter. See as to construction of this section, generally: *Williams v. People*, 33 N. Y. 688; S. C., 45 Barb. 201; as to husband and wife, *Wehrcamp v. Willett*, 1 Keyes, 250; in N. Y., see *Laws 1867*, ch. 887.

§ 390. A party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled, in the same manner, and subject to the same rules of examination, as any other witness, to testify, either at the trial, or conditionally, or upon commission. See, as to parties, *Forward v. Harris*, 30 Barb. 379; *Woods v. DeFiganiere*, 16 Abb. Pr. 1; 1 Rob. 607; 25 How., Pr. 522; *Roberts v. Gee*, 15 Barb. 449; *Ravenburg v. Ravenburg*, 47 Barb. 419. *Burnett v. Harris*, 50 Id. 379, does not abrogate law admitting books of account as evidence in certain cases; *Clark v. Smith*, 46 Barb. 30; *Tomlinson v. Borst*, 30 Id. 42; *Stroud v. Tilton*, 3 Keyes, 139; nor the law making parties to a suit competent witnesses, *Giberton v. Ginocho*, 1 Hilt. 218; *Story v. Louett*, 1 E. D. Smith, 153; *Jones v. Underwood*, 28 Barb. 481, 484; *King v. Smith*, 21 Id. 158. As to perpetuating evidence, *Paton v. Westervelt*, 5 How. Pr. 399. But see *Keeler v. Dusenbury*, 1 Duer, 660. As to a corporation and its books, see *Goodyear v. Phoenix Rubber Co.*, 48 Barb. 522; but see *Carr v. Great Western Insurance Co.*, 3 Daly, 160; *LaFarge v. LaFarge Ins. Co.*, 14 How. 26; *Woods v. Figaniere*, 16 Abb. 159. As to the subpœna, *Lane v. Cole*, 12 Barb. 680; *Hasbrock v. Baker*, 10 Johns. 248; *Heermans v. Williams*, 11 Wend. 636; *Courtney v. Baker*, 3 Den. 27; *Cogswell v.*



was alike circuitous and expensive. In modern times the courts of common law took upon themselves, to relax considerably the strictness of the

Meech, 15 Wend. 147; Bonesteel v. Lynde, 8 How. Pr. 226; Garighe v. Gosche, 6 Abb. 284; 14 How. 453; 6 Duer, 685; Woods v. DeFiganiere, 16 Abb. 159; 1 Rob. 659; People v. Dyckman, 24 How. 222; Brett v. Bucknam, 32 Barb. 655.

§ 391. The examination, instead of being had at the trial as provided in the last section, may be had at any time before the trial, at the option of the party claiming it, before a judge of the court, or a county judge, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless, for good cause shown, the judge order otherwise. But the party to be examined shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance. Cook v. Bidwell, 29 How. Pr. 483; 17 Abb. Pr. 300; Fullerton v. Gaylord, 7 Rob. 552; Green v. Wood, 15 How. Pr. 338; Duffy v. Lynch, 36 Id. 509; Bell v. Richmond, 50 Barb. 571; Norton v. Abbott, 28 How. Pr. 338; Green v. Herder, 7 Rob. 455; VanRensselaer v. Tubbs, 31 How. 193; Appleton v. Appleton, 50 Barb. 486; Plato v. Kelly, 16 Abb. Pr. 188; People v. Dyckman, 24 How. 223; Taylor v. Jennings, 7 Rob. 581.

§ 392. The party to be examined, as in the last section provided, may be compelled to attend in the same manner as a witness who is to be examined conditionally; and the examination shall be taken and filed by the judge in like manner, and may be read by either party on the trial. Barry v. Galvin, 37 How. 310; Green v. Herder, 30 How. Pr. 210; Draper v. Henningsen, 1 Bosw. 614; Taggard v. Gardner, 2 Sandf. 669; VanRensselaer v. Tubbs, 31 How. Pr. 193; Ganghe v. Laroche, 14 Id. 451; 6 Abb. Pr. 284; and see Leeds v. Brown, 5 Abb. 418; see as to fees, Taggard v. Gardner, 2 Sandf. 669; Draper v. Henningsen, 1 Bosw. 614; Hewlett v. Brown, 1 Bosw. 665.

§ 393. The examination of the party thus taken may be rebutted by adverse testimony. Boyd v. Colt, 20 How. Pr. 384; Losee v. Morey, 57 Barb. 561; Forward v. Harris, 30 Barb. 338; Pickard v. Collins, 23 Barb. 444; Barry v. Galvin, 37 How. Pr. 310; Parsons v. Suydam, 3 E. D. Smith, 276; Armstrong v. Clark, 2 Code R. 143; Muir v. Culy, 10 Up.

ancient rule ; and at length it became the established practice, that when a document in which both litigant parties had a joint interest, was in the custody or con-

Can., Q. B. 321 ; Bemis v. Kyle, 5 Abb. Pr., N. S. 232 ; People v. Skeehan, 49 Barb. 217.

§ 394. If a party refuse to attend and testify, as in the last four sections provided, he may be punished as for a contempt, and his complaint, answer, or reply, may be stricken out. Woods v. De Figanieri, 16 Abb. Pr. 1 ; 25 How. Pr. 522 ; Hewlett v. Brown, 1 Bosw. 655 ; 7 Abb. Pr. 74 ; Norton v. Abbott, 28 How. Pr. 388. As to waiving or excusing the default, see Bennett v. Hall, 10 N. Y. Leg. Obs. 191 ; Satterlee v. De Comeau, 7 Rob. 661 ; Gardiner v. Peterson, 14 How. Pr. 513 ; no stay of proceedings ; Appleton v. Appleton, 50 Barb. 486.

§ 395. A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf, subject to the same rules of examination as other witnesses. But, if he testify to any new matter, not responsive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answers thereto, or discharge when his answers would charge himself, such adverse party may offer himself as a witness on his own behalf in respect to such new matter, subject to the same rules of examination as other witnesses, and shall be so received. (§ 398 of the Code provides that " no person offered as a witness in any action or proceeding in any court, or before any officer acting judicially, shall be excluded, by reason of his interest in the event of the action or proceeding, or because he is a party thereto, except as provided in the following section. See N. Y., Laws of 1869, ch. 678.)

§ 399, referred to, is as follows : No party to any action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title, by assignment or otherwise, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person, at the time of such examination, deceased, insane, or lunatic, against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or committee of such insane person or lunatic. But this prohibition shall not ex-

trol of one of them, under such circumstances that he might fairly be deemed a trustee of it for both, the court would order an inspection and copy of it to be

tend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor, or committee shall be examined on his own behalf, or as to which the testimony of such deceased person or lunatic shall be given in evidence. See authorities cited in Wait's New York Annotated Code (1875), pp. 746-757.

§ 396. A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination, as if he were named as a party. *Jessop v. Willer*, 1 Keyes, 321.

§ 397. A party may be examined on behalf of his co-plaintiff or of a co-defendant, as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment can be rendered. And he may be compelled to attend in the same manner as at the instance of an adverse party, but the examination thus taken shall not be used in the behalf of the party examined. And whenever, in the case mentioned in §§ 390 and 391, one of several plaintiffs or defendants, who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself as a witness to the same cause of action or defense, and shall be so received. This section "has no force or application in any possible case since 1860." *Card v. Card*, 39 N. Y. (12 Tiff.) 321, 322, 7 Trans. App. 144. The Code elsewhere provides that (§ 388 [341, 342]) "either party may exhibit to the other, or to his attorney, at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness. If the adverse party, or his attorney, fail to give the admission, within four days after the request, and if the party exhibiting the paper be afterwards put to expense in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense, to be ascertained at the trial, shall be paid by the party refusing the admission, unless it appear to the satisfaction of the court that there were good reasons for the refusal. The court before which an action is pending, or a judge or justice thereof, may, in their discretion, and upon

given to his adversary, if it were material to his suit or defense. (*d'*)

Even this, however, fell far short of the requirements of justice ; and the legislature at length interfered, and by the 14 & 15 Vict. c. 99, s. 6, empowered the superior courts of common law and each of the judges thereof, on application made for such purpose, by either of the litigants in any action, or other legal proceeding pending in any of the said courts, to compel the opposite party to allow the party making the application, to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and, if necessary, to take examined copies of the same, or to procure the same to be duly stamped ; in all cases in which, previous to the passing of that act, a discovery might

(*d*) *Charnock v. Lumley*, 5 Scott. 438 ; *Steadman v. Arden*, 15 M. & W. 687 ; *Goodliff v. Fuller*, 14 Id. 4 ; *Smith v. Winter*, 3 Id. 309 ; *Dey v. Barlow*, 1 Exch. 800 ; *The Metropolitan Saloon Omnibus Company v. Hawkins*, 4 H. & N. 146 ; *Shadwell v. Shadwell*, 6 C. B., N. S. 679 ; *Price v. Harrison*, 8 C. B., N. S. 617.

due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both." See *Brevoort v. Warner*, 8 How. Pr. 321 ; *Lefferts v. Brampton*, 24 Id. 257 ; *Pindar v. Seaman*, 33 Barb. 140 ; *Exchange Bank v. Monteath*, 4 How. Pr. 280 ; *Gould v. McCarty*, 11 N. Y. 575. This section is auxiliary to, and not a substitute for, the N. Y. Statute, 12 R. S. 199. *Morrison v. Sturges*, 26 How. Pr. 177 ; *Follett v. Weed*, 3 Id. 303 ; *Dole v. Fellows*, 5 Id. 451 ; *Davis v. Durham*, 13 Id. 425 ; *Pindar v. Seaman*, 33 Barb. 140. See Rules of N. Y. Supreme Court, 18, 19, 20, 21, 22 ; and authorities cited in *Wait's Annotated N. Y. Code* (1875), S. P. 735-738.

have been obtained by filing a bill, or by any other proceeding in a court of equity, at the instance of the party so making application as aforesaid to the said court or judge. And in the construction of this statute it was held, first, that it did not take away the common law ; so that, in every case in which a party could have obtained inspection before the statute, he might obtain it still, without reference to the statute ; (e) and, secondly, that the power conferred on the courts of common law by this statute, could only be exercised in cases where the inspection sought for, could be obtained by a bill of discovery, or other proceeding in a court of equity ; and did not enable them to compel a party to discover whether certain documents, or whether any and what documents relating to the cause, were in his possession or power. (f)

625. 2. This defect was remedied by the 17 & 18 Vict. c. 125, s. 50. And now, by the "Supreme Court of Judicature Act, 1873," (g) the court or a judge may, at any time during the pendency of any action or proceeding, order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such action or proceeding, as the court or judge shall think right ; and the court may deal with such documents, when produced, in such manner as shall appear just. But inspection under this enactment will be granted,—as it was under the 17 & 18 Vict. c. 125, s. 50,—only when it is applied for in a

(e) *Bluck v. Gompertz*, 7 Exch. 67 ;  
*Sneider v. Mangino*, 7 Exch. 229 ;  
*Doe d. Child v. Roe*, 1 E. & B. 279 ;  
*Doe d. Avery v. Langford*, 1 B. C. C.  
 37 ; *Shadwell v. Shadwell*, 6 C. N. S.  
 679.

(f) *Hunt v. Hewitt*, 7 Exch. 236.

*Rayner v. Allhusen*, 2 L., M. & P.  
 605 ; *Galsworthy v. Norman*, 21 L. J.  
 Q. B. 70 ; *Scott v. Walker*, 2 E. & B.  
 555.

(g) 36 & 37 Vict. c. 66, *sched.*, rule  
 27. And see Rules of Court, under  
 that act, *Order* 28.

bona fide action; and it will therefore be refused when the court sees that the action has been brought, not to obtain redress from the defendant, but, by means of an application for inspection, to get at evidence to be used in other proceedings against a third party. (*h*) So, in granting inspection under this enactment, the court will refuse every application which is merely of a fishing nature. (*i*) But it will be no answer to an application thereunder, that the documents required to be produced are such as the party is privileged from producing; for if such be the fact, it may be shown in the affidavit to be made in obedience to the rule directing inspection. (*k*)

**625A. 3.** Again, by the 17 & 18 Vict. c. 125, s. 58, the court or a judge was empowered to grant to either party to an action, a rule or order for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection whereof might be material to the proper determination of the question in dispute. And it was held that this section gave, as ancillary to the power to order inspection, the same power to order the removal of obstructions, with a view to inspection, as was exercised by courts of equity in like cases. (*l*)

This power of inspection has, as we have seen, been continued and extended by the "Supreme Court of Judicature Act, 1873." (*m*)

**625 B. 4.** Similar powers to those mentioned in the 17 & 18 Vict. c. 125, ss. 50, 58, were conferred on the Court of Admiralty, by the 24 Vict. c. 10, ss. 17 and 18.

(*h*) See *Temperley v. Willett*, 6 E. N. S. 679.  
& B. 380

(*k*) *Forshaw v. Lewis*, 10 Exch. 712.

(*i*) See *Gomm v. Parrott*, 3 C. B., N. S. 47; *Wright v. Morrey*, 11 Exch. 467.

(*l*) *Bennett v. Griffiths*, 3 E. & E.

209; *Shadwell v. Shadwell*, 6 C. B.,

(*m*) Sched., rule 45, *supra*, § 197.

626. 5. By the Patent Law Amendment Act, 15 & 16 Vict. c. 83, s. 42, it was enacted, that "in any action in any of her Majesty's superior courts of record for the infringement of letters patent, it should be lawful for the court in which such action was pending, if the court were then sitting, or if the court were not sitting, then for a judge of such court, on the application of the plaintiff or defendant respectively, to make such order for an injunction, inspection, or account, and to give such direction respecting such action, injunction, inspection, and account, and the proceedings therein respectively, as to such court or judge might seem fit." But the "inspection" authorized by this section, was an inspection of the instrument or machinery manufactured or used by the parties, with a view to procuring evidence of infringement. (*n*) And it was made a question whether the power of the court to grant such inspection, was limited to granting an external inspection only, or enabled it also to order a portion of the inspected article to be given up for analysis. (*o*) This latter power has now, as we have seen, been expressly given by the "Supreme Court of Judicature Act, 1873." (*p*)

627. 6. And, in providing for the compulsory discovery of evidence from litigant parties before trial, the 17 & 18 Vict. c. 125, not only supplied deficiencies in the 14 & 15 Vict. c. 99, but introduced an entirely new machinery into the common-law system of evidence and forensic procedure, by authorizing either party to a cause in any of the superior courts—subject to the provisions in that behalf contained in that statute—(*q*) to deliver to the other, interrogatories in

(*n*) *Vidi v. Smith*, 3 E. & B. 969, *Company v. Lloyd*, 5 H. & N. 192.  
974.

(*p*) Sched., rule 45, *supra*, § 197.

(*o*) *The Patent Type Founding*

(*q*) See sects. 51-57.

writing upon any matter as to which discovery might be sought.

And now, by the "Supreme Court of Judicature Act, 1873," (*r*) "subject to any rules of court, a plaintiff in any action shall be entitled to exhibit interrogatories to, and obtain discovery from any defendant, and any defendant shall be entitled to exhibit interrogatories to and obtain discovery from a plaintiff or any other party."

628. In carrying out these provisions, the courts will hold a tight hand; as otherwise it might be made a mere matter of course to deliver interrogatories in every case, thus needlessly adding to the expense of legal proceedings. (*s*) And there are several decisions to show that, in allowing interrogatories, the court will adhere to the established principles of evidence. Thus, interrogatories must be put within a reasonable range, (*t*) and must not be made the means of evading the rule which requires the production of primary evidence. (*u*) So the party to whom they are administered possesses the privilege of other witnesses; (*x*) and consequently he will not be compelled to state the contents of, or to describe documents which are his muniments of title; (*y*) nor, except under special circumstances, to answer questions tending to criminate him, or expose him to penalty or forfeiture. (*z*)

(*r*) 36 & 37 Vict. c. 66, sched., rule 25. And see Rules of Court, under that act, Order 28.

(*s*) This is expressly provided against, by the "Supreme Court of Judicature Act, 1873," sched., rule 25. And see *Martin v. Hemming*, 10 Exch. 478, 484, per Parke, B.; *Smith v. The Great Western Railway Company*, 2 Jurist, N. S. 668, 669, per Lord Campbell.

(*t*) *Robson v. Crawley*, 2 H. & N. 766.

(*u*) *Herschfeld v. Clarke*, 11 Exch. 712; *Moor v. Roberts*, 2 C. B., N. S. 671; *Wolverhampton Railway Company v. Hawksford*, 5 C. B., N. S. 703.

(*x*) Bk. 2, pt. 1. ch. 1, § 126, *et seq.*

(*y*) *Adams v. Lloyd*, 3 H. & N. 351.

(*z*) See *Tupling v. Ward*, 6 H. & N. 749; *Edmunds v. Greenwood*, L. Rep., 4 C. P. 70; *Villeboisnet v. Tobin*, Id.



And, lastly, the courts will only allow interrogatories, the object of which is to obtain evidence to support the case of the party exhibiting them; and will refuse such as are merely fishing, or directed to finding out the case of the opposite party. (*a*)

629. Before dismissing this subject, we would remark that the 20 & 21 Vict. c. 85—which establishes the court for Divorce and Matrimonial Causes, and directs that (*b*) the rules of evidence observed in the superior courts of common law at Westminster, shall be applicable to, and observed in the trial of all questions of fact in that court—contains provisions for the interrogation of the parties to the suit in certain cases. (*c*)

630. 7. The expense of proving documents which are formal in their nature, and not likely to be made the subject of dispute, was long felt to be a grievance. For remedy whereof, certain provisions were inserted in the Regulæ Generales, of Hilary Term, 4 Will. 4, (*d*) and afterwards in the 15 & 16 Vic. c. 76, s. 117. And now, by the “Supreme Court of Judicature Act, 1873,” (*e*) either party may call on the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit after such notice the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the action may be, unless at the hearing or trial, the court certify that the refusal to admit was

184; *Atkinson v. Fosbrooke*, L. Rep., 1 Q. B. 528; *May v. Hawkins*, 11 Exch. 210.

(*a*) *Thol. v. Leask*, 10 Exch. 704; *Horton v. Bott*, 2 H. & N. 249; *Riccard v. The Inclosure Commissioners*, 4 E. & B. 329; *Whateley v. Crowter*, 5 E. & B. 709; *Edwards v. Wakefield*, 6 E. & B. 462; *Moor v. Roberts*, 2 C.

B., N. S. 671; *Pye v. Butterfield*, 5 B. & S. 829.

(*b*) Sect. 48.

(*c*) Sects. 43, 46.

(*d*) See rule 20: “Practice”

(*e*) 36 & 37 Vict. c. 65, sched., rule 39. And see Rules of Court, under that act, Order 29.

reasonable ; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense.

And, by the same rule, any party to an action may give notice, by his own statement or otherwise, that he admits the truth of the whole, or any part of the case stated or referred to in the statement of claim, defense, or reply of any other party.

## CHAPTER II.

## TRIAL AND ITS INCIDENTS.

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**631.** I. Having, in the first Book, explained the nature of our common-law tribunal for the trial of facts, and the respective functions of judge and jury, (a) the course of a trial is soon described. The proceedings commence with a short statement to the jury of the questions they are about to try. In civil cases this statement is made by the plaintiff, if he appears in person; by his counsel, if he appears by counsel; and by his junior counsel if he has more than one; and it is technically termed "opening the pleadings." In criminal cases a summary of the charge against the accused, together with his plea thereto, and the issue joined, is stated to the jury by the officer of the court, and in some cases (b) by the counsel for the prosecution. If there be any question as to which of the contending parties ought to begin, the judge decides that question, and the party who has that right then, either by himself or his counsel, states his case to the jury, and afterwards adduces his evidence in support of it. In criminal cases, where no counsel is employed for the prosecution, the prosecutor can not address the jury, and the evidence is gone into at once; for in contemplation of law the suit is that of the sovereign. (c) The opposite party is then heard in like order. If he adduces evidence, the opener has a right to address the jury in reply; but in prosecutions where the Attorney-General appears officially, and in proceedings in the Exchequer for penalties, he, or his representative, has a right to reply whether evidence

(a) Bk. 1, pt. 21, § 82, *et seq.*

(c) Bk. 2, pt. 1, ch. 2, §§ 169, 183.

(b) *I e.*, in misdemeanors.

is adduced or not. (*d*) In addressing the jury, a party has no right to state facts which he does not intend to call evidence to prove; (*e*) and when this rule is violated the judge may, in his discretion, allow a reply. (*f*) Where a fresh case, *i. e.*, a case not merely answering the case of the party who began, is set up by the responding party, and evidence is adduced to support such fresh case, the party who began may give proof of a rebutting case; his adversary has then a special reply on the new evidence thus adduced, and the opener has a general reply on the whole case. By 17 & 18 Vict. c. 125, s. 18, "Upon the trial of any cause the addresses to the jury shall be regulated as follows: The party who begins, or his counsel, shall be allowed, in the event of his opponent not announcing at the close of the case of the party who begins, his intention to adduce evidence, to address the jury a second time at the close of such case, for the purpose of summing up the evidence; and the party on the other side, or his counsel, shall be allowed to open the case, and also to sum up the evidence (if any); and the right to reply shall be the same as at present:" and 28 & 29 Vict. c. 18, s. 2, enacts that, "If any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask the counsel, for each prisoner or defendant so defended by counsel, whether he or they intend to adduce evidence, and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecu-

(*d*) Resolutions of the judges, 7 C. & P. 676, Res. 5; R. v. Horne, 20 Ho. St. Tr. 660-664; R. v. Radcliffe, 1 W. Bl. 3; R. v. Marsden, 1 Mood. & M. 439.

(*e*) Bk. 1, pt. 1, § 94, and *infra*.

(*f*) Crerar v. Sodo, 1 Mood. & M. 85; Faith v. M'Intyre, 7 C. & P. 44. The notion that this may be claimed as a *right* can not be supported.

tion shall be allowed to address the jury a second time, in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants; and upon every trial for felony or misdemeanor, whether the prisoners or defendants, or any of them, shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their case or cases respectively; and after the conclusion of such opening, or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses as he or they may think fit, and when all the evidence is concluded, to sum up the evidence respectively; and the right of reply, and practice and course of proceedings, save as hereby altered, shall be as at present." The party against whom real or documentary evidence is adduced, has a right to inspect it; and such evidence can be read to, or laid before the jury, only if no valid objection to it appears. Every witness called is first examined by the party calling him, and this is denominated his "examination-in-chief." If an objection is made to his competency, he is interrogated as to the necessary facts, and this is called examination on the voir dire. (g) The party against whom any witness is examined has a right to "cross-examine" him: after which the party by whom he is called may "re-examine" him, but only as to matters arising out of the cross-examination. The court and jury may also put questions to the witnesses, and inspect all media of proof adduced by either side. The court, generally speaking, is not only not bound by the rules of practice relative to the manner of questioning witnesses, and the order of

(g) Bk. 2, pt. 1. ch. 2, § 133, and Bk. 2, pt. 2, ch. 3, § 450.

receiving proofs, but may in its discretion dispense with them in favor of parties or counsel. During the whole course of the trial, the judge determines all questions of law and practice which arise; and if the admissibility of a piece of evidence depends on any disputed fact, the judge must determine that fact, and for this purpose go into proofs, if necessary. (*h*)

**632.** The common-law right of a party to appear by counsel, when that right is accorded to the other side, was long subject to a remarkable exception, *i. e.*, in cases of persons indicted or impeached for treason or felony. It was otherwise in prosecutions for misdemeanor; (*i*) as also in appeals of felony: (*j*) and even on indictments or impeachments for treason or felony, the exception was confined to cases where the accused pleaded the general issue, and did not extend to preliminary or collateral matters; such as pleas to the jurisdiction, (*k*) pleas of sanctuary, (*l*) or of autrefois acquit, (*m*) the trial of error in fact to reverse outlawry, (*n*) issues on identity when brought up to receive judgment, (*o*) &c. And even on the trial of the general issue, if a point of law arose which the court considered doubtful, they assigned the accused counsel to argue it on his behalf. (*p*) For the refusal of counsel to accused persons in these cases, the most serious and important which can come before a court of justice, several reasons are assigned in our old books. 1. That in criminal proceedings at the suit

(*h*) Bk. 1, pt. 1, § 82.

(*i*) 6 Ho. St. Tr. 797.

(*j*) Dr. & Stud. Dial. 2, ch. 48; 9 Edw. IV. 2 A, pl. 4; 8 Ho. St. Tr. 726; Staundf. Pl. Cor. lib. 2, c. 63.

(*k*) 11 Ho. St. Tr. 523-526.

(*l*) Humphrey Stafford's case, 1 Hen. VII. 26 A.

(*m*) 41 Ass. pl. 9.

(*n*) Burgesses' case, Cro. Car. 365.

(*o*) Ratcliffe's case, Fost. Cr. Law 40; 18 Ho. St. Tr. 434.

(*p*) 9 Edw. IV. 2 A, pl. 4; 1 Hen. VII. 26 A.; Staundf. Pl. Cor. lib. 2, c. 63; 2 Hawk. P. C. 401.

of the crown, the accused does not need the protection of counsel, seeing that it can not be intended that the crown is actuated by malice against him; whereas in appeals, great malice on the part of the appellant must be intended, and consequently counsel ought to be allowed to the accused. (*q*) But although it is perfectly true that no malice against the accused can be intended in the crown, it is going a great way to extend so strong a presumption to its officers; who might also, even without any evil intention, and through mere error in judgment, pervert both its immense prerogatives and their own abilities and legal acquirements, to procuring the condemnation of innocent persons. Besides, the argument proves too much; for, if sound, the rule ought to have extended to cases of misdemeanor. 2. That trial of the general issue is a trial not of matter of law, but of matter of fact, the truth of which must be better known to the accused than to his counsel: (*r*) an argument which also manifestly proves too much—for if worth anything it is applicable to every cause, civil and criminal, unless where a point of law is expressly raised by demurrer, or other proceeding where the facts are taken for granted. 3. That the accused ought not to be convicted unless his guilt is so manifest that defense by any counsel, however able, would be hopeless. (*s*) One would naturally suppose that a defense which is hopeless must be harmless to the opposite side. 4. That if counsel were allowed in such cases they would raise trivial objections, and so the proceedings go on ad infinitum: (*t*) an argument at direct variance\* with the ancient maxim of law, “De morte

(*q*) Dr. & Stud. Dial. 2, ch. 48.

(*s*) 3 Inst. 29 and 137.

(*r*) Staundf. Pl. Cor. lib. 2, c. 63;  
Finch, Law, 386.

(*t*) 11 Ho. St. Tr. 525; Staundf. Pl.  
Cor. lib. 2, c. 63.



hominis nulla est cunctatio longa." (u) The best answer to it, however, is, that since counsel have been allowed in treason and felony no such consequence has followed. 5. That counsel are unnecessary, it being the duty of the court to be counsel for the prisoner: (v) a wretched misapplication of a noble constitutional maxim, namely, that if an accused person has no counsel, it is the duty of the court to see that he does not suffer for want of counsel: *i. e.*, to give him the benefit of any point of law in his favor, though through ignorance he can not himself take advantage of it; to see that he is not oppressed by the legal ingenuity of the opposing advocates; and generally to secure him a fair trial. (x) But it is not possible, and would be indecorous if it were, for the court to act as counsel in the ordinary sense of the term, for an accused or any other party—in other words, to combine the incompatible functions of judge and advocate. Besides, although counsel were always allowed in cases of misdemeanor, we are not aware that when a person accused of a misdemeanor is undefended by counsel, the court is exonerated from the duty of seeing that he is convicted according to law. 6. That if the party defends himself, his conscience will perhaps sting him to utter the truth, or at least his gesture or countenance show some signs of it; and if they do not, still his speech may be so simple, that the truth shall be thereby discovered sooner than by the artificial speech of learned men. (y) When a prisoner's conscience stings him to utter the truth, the

(u) Co. Litt. 134b.

(v) 3 Inst. 29 and 137; Dr. & Stud. Dial. 2, ch. 48.

(x) That this is the true meaning of the maxim, that the judge is the pris-

oner's counsel, see 5 Ho. St. Tr. 466, note; 6 Id. 516, note.

(y) Staundf. Pl. Cor. lib. 2, c. 63; Finch, Law, 386; 2 Hawk. P. C. 400

natural course for him is to plead guilty, and not reserve the disburdening of it for the jury ; and, for one man who in a case of anything like difficulty, has sufficient sense and nerve to defend himself with clearness and effect, twenty would injure even a good cause by their ignorance and confusion.

**633.** It is not worth while to discuss the origin of this practice —whether it formed part of the ancient common law, or like many other abuses, crept in gradually. (*z*) We certainly find the practice clearly stated as above, so early as the reign of Edward the Fourth ; (*a*) and from thence down to the alteration of the law after the Revolution of 1688, the prayer of the prisoner to be allowed to be defended by counsel, and the refusal of it by the court, formed the regular prologue to a state trial. (*b*) At that period a heavy blow was aimed at the established practice, by the statute, 7 & 8 Will. 3, c. 3, which after reciting that “ nothing is more just and reasonable, than that persons prosecuted for high treason and misprision of treason, whereby the liberties, lives, honor, estates, blood, and posterity of the subjects, may be lost and destroyed, should be justly and equally tried, and that persons accused as offenders therein, should not be debarred of all just and equal means for defense of their innocencies in such cases ; ” enacts that every person so accused and indicted, arraigned, or tried for any treason, whereby any corruption of blood may ensue, &c., or misprision of such treason, shall be received and admitted to make their full defense by counsel learned in the law. A like law was extended to parliamentary

(*z*) Vide Mirror of Justices, chap. 3, sect. 1 ; and Dr. & Stud. Dial. 2, ch. 48.

(*a*) 9 Edw. IV. 2, pl. 4. See also

per Gascoigne, C. J., 7 Hen. IV. 53b, pl. 4.

(*b*) See the State Trials passim. Several of these cases are collected, 5 Ho. St. Tr. 466 *et seq.* (note

impeachments by 20 Geo. 2, c. 30. And by 39 & 40 Geo 3, c. 93, and 5 & 6 Vict. c. 51, s. 1, treasons, where the overt act charged is the actual assassination of the sovereign, or other offense against his person, are to be tried in every respect as if the accused stood charged with murder.

634. Although the 7 & 8 Will. 3, c. 3, did not extend to cases of felony, yet a practice gradually grew up during the last century, which continued until the reign of William the Fourth; by which the counsel for a prisoner were allowed to advise him during his trial; to take points of law in his favor; to examine and cross-examine witnesses on his behalf; and, in short, to do everything except address the jury in his defense. But by the 6 & 7 Will. 4, c. 114, the whole anomaly was removed. That statute, after reciting that "it is just and reasonable that persons accused of offenses against the law, should be enabled to make their full answer and defense to all that is alleged against them," enacts in its first section, that "all persons tried for felonies shall be admitted, after the close of the case for the prosecution, to make full answer and defense thereto, by counsel learned in the law, or by attorney in courts where attorneys practice as counsel."

635. In construing this statute several judges ruled that, when an accused person defends himself he may state in his defense what facts he thinks proper, and although he adduces no evidence to prove them, the jury may weigh the credit due to his statement; but that counsel who defend prisoners are bound by the rule of practice in civil cases, viz., only to state such facts, as they believe they are in a condition to establish by evidence. (c) According to this dogma,

(c) *R. v. Beard*, 8 C. & P. 142; *R. v. Butcher*, 2 M. & Rob. 229; *R. v. Burrows*, Id. 124.

when a prisoner's defense rests, as it often necessarily must rest, on an explanation of apparently criminating circumstances, his employing counsel causes his defense to be suppressed—a state of things hardly contemplated by the framers of the statute, and certainly at variance with the principles of natural justice. It is sought to defend this anomalous proceeding on the ground that the counsel for the accused may put his client's defense before the jury in a hypothetical form:—but how feebly does this tell in comparison with a straightforward explanation! Some judges have sought to qualify the rule, by allowing the accused to make a statement of the facts he deems essential, leaving it to be commented on by his counsel; but this course has not been followed by other judges, and the practice on the subject can not be considered settled. (*d*) It is worthy of observation, that in cases of treason the prisoner is not only allowed, but invited by the court, to address the jury after his counsel have spoken for him. (*e*)

**636. II.** Proceeding to the second part of our subject: the first incident connected with a trial, which requires particular notice, is the practice of ordering witnesses out of court. When concert or collusion among witnesses is suspected, or there is reason to apprehend that any of them will be influenced by the statements of counsel, or the evidence given by other witnesses, the ends of justice require

(*d*) *R. v. Malings*, 8 C. & P. 242; *R. v. Walkling*, Id. 243; *R. v. Clifford*, 2 Car. & K. 206; *R. v. Manzano*, 2 F. & F. 64. See also *R. v. Haines*, 1 F. & F. 86; and *R. v. Taylor*, Id. 535.

(*e*) See *R. v. Watson*, 32 Ho. St. Tr. 538; *R. v. Thistlewood*, 33 Id. 894;

*R. v. Ings*, Id. 1107; *R. v. Collins*, 5 C. & P. 311; *R. v. Frost*, 9 Id. 161, &c., &c. In *R. v. O'Coigly*, 26 Ho. St. Tr. 1191, 1374, Buller, J., gave the prisoners the option of addressing the court, either before or after their counsel had spoken.

that they be examined apart; and the court will proprio motu, or on the application of either party, order all the witnesses, except the one under examination to leave court. This practice is probably coeval with judicature. "Si necessitas exegerit," says Fortescue, (*f*) "dividantur testes, donec ipsi deposuerint quicquid velint, ita quod dictum unius non docebit, aut concitabit eorum alium ad consimiliter testificandum." The better opinion, however, seems to be that this is not demandable ex debito justitiæ; (*g*) and there may be cases where it would be judicious to refuse it. It is said that the rule does not extend to the parties in the cause; (*h*) nor, at least in general, to the attorneys engaged in it. (*i*) A witness who disobeys such an order is guilty of contempt; but the judge can not refuse to hear his evidence, (*k*) although the circumstance is matter of remark to the jury. In revenue cases in the Exchequer, indeed, it is said that his evidence is imperatively excluded. (*l*) And in order to prevent communication in such cases, between witnesses who have been examined and those awaiting examination, it is a rule that the former must remain in court, until the latter are examined. But where the first witness examined was a respectable female, and some indelicate evidence was expected to be given by the other witnesses, it was arranged that she should be taken out

(*f*) C. 26.

(*g*) See the authorities collected, 1 Greenl. Ev. § 432, 7th Ed.; Tayl. Ev. § 1259, 4th Ed.

(*h*) Charnock v. Dewings, 3 Car. & K. 378; Constance v. Brain, 2 Jur., N. S. 1145; Selfe v. Isaacson, 1 F. & F. 194.

(*i*) Pomeroy v. Baddeley, Ry. & M. 430; Everett v. Lownham, 5 Car. &

P. 91.

(*k*) Chandler v. Horne, 2 Moo. & R. 423; Cook v. Nethercote, 6 C. & P. 743, and the cases there referred to; and per Lord Campbell, delivering the judgment of the court in Cobbett v. Hudson, 1 Ell. & B. 11, 14.

(*l*) Rosc. Cr. Ev. 127-8, 6th Ed.; 1 Greenl. Ev. 432, 7th Ed.; and Tayl. Ev. § 1260, 4th Ed.

of court, and kept under observation in a separate apartment. (*m*)

**637.** Next, with respect to the Order of Beginning, or *Ordo Incipiendi*. This is known in practice as the "Right to Begin;" not a very accurate expression—for it assumes that beginning is always an advantage, whereas it may be quite the reverse. There are few heads of practice on which a larger number of irreconcilable decisions have taken place. It is sometimes said that as the plaintiff is the party who brings the case into court, it is natural that he should be first heard with his complaint; and in one sense of the word the plaintiff always begins; for, without a single exception, the pleadings are opened by him, or his counsel, and never by the defendant or his counsel. But, as it is agreed on all hands that the order of proving depends on the burden of proof; if it appears on the statement of the pleadings, or whatever is analogous thereto, that the plaintiff has nothing to prove—that the defendant has admitted every fact alleged, and takes on himself to prove something which will defeat the plaintiff's claim, he ought to be allowed to begin, as the burden of proof then lies on him. The authorities on this subject present almost a chaos. Thus much only is certain, that if the onus of proving the issues, or any one of the issues, however numerous they may be, lies on the plaintiff, he is entitled to begin; (*n*) and it seems that if the onus of proving all the issues lies on the defendant, and the damages which the plaintiff could legally recover are either nominal, or mere matter of computation, here

(*m*) *Streeten v. Black*, Guildf. Sum. Ass. 1836, cor. Lord Abinger, C. B. MS.

(*n*) *Wood v. Pringle*, 1 Moo. & R.

277; *James v. Salter*, Id. 501; *Curtis v. Wheeler*, 4 C. & P. 106; *Williams v. Thomas*, Id. 234.

also the defendant may begin. (*o*) But the difficulty is, where the burden of proving the issue, or all the issues, if more than one, lies on the defendant, and the onus of proving the amount of damage lies on the plaintiff. A series of cases (not an unbroken series, for there were several authorities the other way), concluding with that of *Cotton v. James*, (*p*) in 1829, established the position, that the onus of proving damages made no difference, and that under such circumstances the defendant ought to begin. Of these the most remarkable is that of *Cooper v. Wakley*, (*q*) in 1828; where it was held by Lord Tenterden, C. J., and Bayley, Littledale, and Parke, JJ., that in an action by a surgeon for libel, in imputing to him unskillfulness in performing a surgical operation, if the defendant pleads a justification he is entitled to begin. Thus matter stood until the case of *Carter v. Jones*, (*r*) in 1833, which also was an action for libel, to which a justification was pleaded; and, on the right to begin being claimed by the defendant, Tindal, C. J., before whom the case was tried, said that a rule on the subject had been come to by the judges. He then stated verbally the nature of that rule, but his language is given very differently in the two reports of the case. In *Carrington & Payne*, it is reported thus: "The judges have come to a resolution, that justice would be better administered by altering the rule of practice, in the respect alluded to, and that, in future, the plaintiff should begin in all actions for personal injuries, and also in slander and libel, notwithstanding the general issue may not be pleaded, and the affirmative be on

(*o*) *Fowler v. Coster*, 1 Moo. & M. 273.

241.

(*p*) 3 C. & P. 505; 1 Moo. & M.

(*q*) 3 C. & P. 474; 1 Moo. & M. 248

(*r*) 6 C. & P. 64; 1 Moo. & R. 281.

the defendant. . . . It is most reasonable that the plaintiff, who brings the case into court, should be heard first to state his complaint." In *Moody & Robinson*, it is reported thus: "A resolution has recently been come to by all the judges, that in cases of slander, libel, and other actions, where the plaintiff seeks to recover actual damages of an unascertained amount, he is entitled to begin, although the affirmative of the issue may, in point of form, be with the defendant." As might have been expected, many questions arose relative to the extent of this rule, and especially its applicability to actions of contract; but a new light was thrown on the whole subject by the case of *Mercer v. Whall*, (s) which came before the Court of Queen's Bench in 1845; in which Lord Denman, C. J., in delivering the judgment of the court, stated, (t) that the rule promulgated by Chief Justice Tindal in *Carter v. Jones*, had originally been reduced to writing, and signed with the initials of several of the judges, and was then in his own possession; that its terms were, that "in actions for libel, slander, and injuries to the person, the plaintiff shall begin, although the affirmative issue is on defendant:" and that that rule was not at all intended to introduce a new practice, but was declaratory or restitutive of the old, which had been broken in upon by *Cooper v. Wakley*, and that class of cases. (u) Since *Mercer v. Whall*, the subject seems to have been better understood: and, whether the rule in *Carter v. Jones* is to be considered as declaratory or enacting, it certainly is a great step in the right direction, of restoring to the

(s) 5 Q. B. 447.

(t) *Id.* 462.

(u) It is remarkable that in all the cases decided on the construction of this rule, between 1833 and 1845, and

they are very numerous, not a single expression of any judge is to be found, implying that it was declaratory in its nature.



plaintiff his natural "right to begin," whenever he really has anything to prove. In some instances the right to begin is regulated by statute. (*v*)<sup>1</sup>

638. Much of the confusion and inconsistent ruling on this subject, may be traced to a notion which formerly prevailed, viz., that the order of beginning was exclusively to be determined by the judge as *Nisi Prius*, and that, consequently, the court in banc would not interfere to rectify any mistake, however gross, which might be committed in this respect. (*x*) It would, it was argued, lead to much litigation and vexation if motions for new trials were entertained on such a ground; especially as, since the wrong decision of the judge would in all likelihood be founded on a misconception of the *onus probandi*, he would carry that erroneous view into his direction to the jury, in which case a new trial would be grantable *ex debito justitiæ*, for an inversion of the burden of proof. But in many cases, the fact of allowing the wrong party to begin, might be productive of the greatest mischief, although followed by an unimpeachable summing-up. And a series of authorities has now settled, that where the ruling of the judge with reference to the right to begin, is erroneous in the judgment of the court in banc, and "clear and manifest wrong" has resulted from that ruling, a new trial will be granted by the court, not as matter of right, but as matter of judgment. (*y*)

(*v*) *E.g.*, 15 & 16 Vict. c. 83, s. 41.

*Edwards v. Matthews*, 11 Jur. 398;

(*x*) *Bird v. Higginson*, 2 A. & E. 160; *Burrell v. Nicholson*, 1 Moo. & R. 304; *Ashby v. Bates*, 15 M. & W. 596, per Rolfe, B.

*Brandford v. Freeman*, 5 Exch. 734; *Leete v. The Gresham Life Insurance Society*, 15 Jur. 1161; *Ashby v. Bates*, 15 M. & W. 589; *Booth v. Millns*,

(*y*) *Geach v. Ingall*, 14 M. & W. 95;

*Id.* 669; *Huckman v. Fernie*, 3 M. &

<sup>1</sup> See Mr. Reed's "Practical Suggestions for the Management of Lawsuits," N. Y., James Cockcroft & Co., 1875, pp. 236-341.

**639.** The right to begin is an advantage to a party who has a strong case and good evidence, as it enables him to make the first impression on the tribunal; and if evidence is adduced by the opposite side, it entitles him to reply, thus giving him the last word. But if the case of a party be a weak one; if he has only slight evidence, or perhaps none at all to adduce in support of it; and goes to trial on the chance (if defendant) of the plaintiff being nonsuited, or that the case of the opposite party may break down through its own intrinsic weakness; or trusting to the effect of an address to the jury; the fact of his having to begin might prove instantly fatal to his cause. Thus in *Edwards v. Jones*, (*z*) which was an action by the indorsee against the maker of a promissory note, to which the defendant pleaded a long plea, amounting in substance to want of consideration for the note; to a portion of which the plaintiff replied, that there had been a good consideration given for the note, and to the rest entered a *nolle prosequi*; the judge having ruled that the defendant should begin, his counsel was obliged to admit that he had no witnesses; and the judge immediately directed the jury to find a verdict against him.

**640. 3.** We have already referred to the rule of practice which prohibits counsel, or the parties in civil cases, (*a*) and perhaps also the counsel for accused parties in criminal cases, (*b*) from stating any facts to the jury which they do not intend offering evidence to prove. This must not, however, be understood too literally. A counsel or party has a right to allude to

W. 505 (as corrected in *Booth v. Doe d. Bather v. Brayne*, 5 C. B. 665  
 Millns, *Edwards v. Matthews*, and (*z*) 7 C. & P. 633.  
 Brandford v. Freeman); *Mercer v. (a) Supra*, §§ 631, 635.  
 Whall, 5 Q. B. 447; *Doe d. Worcester (b) Supra*, § 635.  
 Trustees v. Rowlands, 9 C. & P. 736;

any facts of which the court takes judicial cognizance, or the notoriety of which dispenses with proof. (*c*) But more difficulty arises with respect to historical facts. A public and general history is receivable in evidence to prove a matter relating to the kingdom at large; (*d*) probably for the same reason that the law permits matters of public and general interest, to be proved by the declarations of deceased persons, who may be presumed to have had competent knowledge on the subject; or by old documents which, under ordinary circumstances, would be rejected for want of originality. (*e*) Although there are cases to be found in the books, where histories have been received in evidence, and which it might be difficult to support on this principle. (*f*) But a history is not receivable to prove a private right or particular custom. (*g*) In a recent case, (*h*) it was held by the Court of Exchequer, that counsel, or a party at a trial, may refer to matters of general history, provided the license be exercised with prudence; but can not refer to particular books of history, or read particular passages from them, to prove any fact relevant to the cause. Also that works of standard authority in literature may, provided the privilege be not abused, be referred to by counsel or a party at a trial, in order to show the general course of composition, explain the sense in which words are used, and matters of a like nature; but that they can not be resorted to for the purpose of proving facts relevant to the cause. And Sir Edward Coke lays down—

(*c*) Bk. 3, pt. 1, ch. 1, §§ 252-254.

Ed.; Tayl. Ev. § 1585, 4th Ed.

(*d*) B. N. P. 248; 2 Phill. Ev. 155, 10th Ed.; Tayl. Ev. § 1585, 4th Ed.

(*g*) 2 Phill. Ev. 165, 10th Ed.; Tayl. Ev. § 1585, 4th Ed.

(*e*) Bk. 3, pt. 2, ch. 4, §§ 497, 499.

(*h*) *Darby v. Ouseley*, 2 Jurist, N. S.

(*f*) See 2 Phill. Ev. 155-6, 10th

497; 1 H. & N. 1.

"*Autoritates philosophorum medicorum, et poetarum, sunt in causis allegandæ et tenendæ.*" (i) <sup>1</sup>

641. 4. The chief rule of practice relative to the interrogation of witnesses, is that which prohibits "leading questions:" *i. e.*, questions which directly or indirectly suggest to the witness the answer he is to give. The rule is, that on material points a party must not lead his own witnesses, but may lead those of his adversary; in other words, that leading questions are allowed in cross-examination, but not in examination-in-chief. This seems based on two reasons. First, and principally, on the supposition, that the witness has a bias in favor of the party bringing him forward, and hostile to his opponent. Secondly, that the party calling a witness has an advantage over his adversary, in knowing beforehand what the witness will prove, or at least is expected to prove; and that, consequently, if he were allowed to lead, he might interrogate in such a manner, as to extract only so much of the knowledge of the witness as would be favorable to his side, or even put a false gloss upon the whole. (k) On all matters, however, which are merely introductory, and form no part of the substance of the inquiry, it is both allowable and proper for a party to lead his own witnesses, as otherwise much time would be wasted to no purpose. It is sometimes said, that the test of a leading question is, whether an answer to it by "Yes" or "No" would be conclusive upon the matter in issue; (l) but although all such questions undoubtedly come within the rule, it is by no means limited to them. Where "Yes" or "No"

(i) Co. Litt. 264a.

461, 10th Ed.

(k) Ph. & Am. Ev. 887; 2 Ph. Ev.

(l) Rosc. Crim. Ev. 130, 6th Ed.

<sup>1</sup> The authority of philosophers, physicians, and poets is to be alleged and respected in legal proceedings.

would be conclusive on any part of the issue, the question would be equally objectionable: as if, on a traverse of notice of dishonor of a bill of exchange, a witness were led either as to the fact of giving the notice, or as to the time when it was given. So, leading questions ought not to be put when it is sought to prove material and proximate circumstances. Thus, on an indictment for murder by stabbing, to ask a witness whether he saw the accused, covered with blood and with a knife in his hand, coming away from the corpse, would be in the highest degree improper, though all the facts embodied in this question are consistent with his innocence. In practice leading questions are often allowed to pass without objection, sometimes by express, and sometimes by tacit consent. This latter occurs where the questions relate to matters which, though strictly speaking in issue, the examining counsel is aware are not meant to be contested by the other side; or where the opposing counsel does not think it worth his while to object.

On the other hand, however, very unfounded objections are constantly taken on this ground. A question is objectionable as leading when it suggests the answer, not when it merely directs the attention of the witness to the subject respecting which he is questioned. *E. g.*, on a question whether A and B were partners, it has been held not a leading question to ask if A has interfered in the business of B; (*m*) for, even supposing he had, that falls far short of constituting him a partner. In an action for slander, (*n*) in saying of a tradesman that "he was in bankrupt circumstances, that his name had been seen in a list in the Bank-

(*m*) *Nicholls v. Dowding*, 1 Stark.  
81.

(*n*) *Rivers v. Hague*, C. B. Sittings  
after Mich. Term, 1857, MS.

ruptcy Court, and would appear in the next Gazette;" a witness,—having deposed to a conversation with the defendant, in which he made use of the first two of these expressions,—was asked, "Was anything said about the Gazette?" This was objected to as leading but was allowed by Tindal, C. J. So, although there is no case where leading should be avoided more than when it is sought to prove a confession; still, a witness who deposes to a conversation with the accused, may, after having first exhausted his memory in answering the question,—what took place at it,—be further asked,—whether anything was said on such a subject, *i. e.*, on the subject-matter of the indictment. It should never be forgotten that "leading" is a relative, not an absolute term. There is no such thing as "leading" in the abstract—for the identical form of question, which would be leading of the grossest kind in one case or state of facts, might be not only unobjectionable, but the very fittest mode of interrogation in another.

642. There are some exceptions to the rule against leading. 1. For the purpose of indentifying persons or things, the attention of the witness may be directly pointed to them. 2. Where one witness is called to contradict another, as to expressions used by the latter, but which he denies having used; he may be asked directly, Did the other witness use such and such expressions? (*o*) The authorities are not quite agreed as to the reason of this exception; (*p*) and some strongly contend, that the memory of the second witness ought first to be exhausted, by his being asked what the other said on the occasion in ques-

(*o*) *Edmonds v. Walter*, 3 Stark. 7. 43; *Hallett v. Cousens*, 2 Moo. & R.  
 (*p*) *Courteen v. Touse*, 1 Campb. 238.

tion. (g) 3. The rule which excludes leading questions,—being chiefly founded on the assumption, that a witness must be taken to have a bias in favor of the party by whom he is called,—whenever circumstances show that this is not the case, and that he is either hostile to that party or unwilling to give evidence, the judge may in his discretion allow the rule to be relaxed. (r) And it would seem, that for the same reason, if the witness shows a strong bias in favor of the cross-examinaing party, the right of leading him ought to be restrained; but the authorities are not quite clear about this. (s) 4. The rule will be relaxed where the inability of a witness to answer questions put in the regular way, obviously arises from defective memory; or 5. From the complicated nature of the matter as to which he is interrogated.

**643.** Although not to lead one's own witness when that is allowable, is by no means so bad a fault as leading improperly, still it is a fault; for it wastes the time of the court, has a tendency to confuse the witness, and betrays a want of expertness in the advocate. There are, however, cases where it is advisable not to lead under such circumstances. Thus on a criminal trial, where the question turns on identity; although it would be perfectly regular to point to the accused, and ask a witness if that is the person to whom his evidence relates, yet if the witness can, unassisted, single out the accused, his testimony will have more weight.

**644.** 5. One of the chief rules of evidence, as has been shown, is, that no evidence ought to be received

(g) Ph. & Am. Ev. 889; 1 Ph. Ev. 463, 10th Ed.

(s) See Rosc. Crim. Ev. 131, 6th Ed; 2 Phill. Ev. 472-3, 10th Ed.;

(r) Ph. & Am. Ev. 888; 2 Ph. Ev. 462, 10th Ed.

Tayl. Ev. § 1288, 4th Ed.

which does not bear immediately, or mediately, on the matters in dispute. (*t*) As a corollary from this, all questions tending to raise collateral issues, and all evidence offered in support of such issues, ought to be rejected. But many difficulties arise in practice, as to what shall be deemed a collateral issue with reference to the credit of witnesses. In addition to counter-proofs and cross-examination, there are three ways of throwing discredit on the testimony of an adversary's witness. 1. By giving evidence of his general bad character for veracity, *i. e.*, the evidence of persons who depose that he is in their judgment unworthy of belief, even though on his oath. And here the inquiry must be limited to what they know of his general character, on which alone that judgment should be founded; particular facts can not be gone into. (*u*) "There are two reasons," says Parke, B., in the *Attorney-General v. Hitchcock*, (*x*) "why collateral questions, such a witness having committed some particular crime, can not be entered into at the trial. One is that it would lead to complicated issues and long inquiries without notice; and the other that a man can not be expected to defend all the acts of his life." And Alderson, B., in his judgment in that case, (*y*) says, "The inconvenience of asking a witness about particular transactions, which he might have been able to explain if he had had reasonable notice that he would be required to do so, would be great—a man does not come into the witness-box prepared to show that every act of his life has been perfectly pure: and you therefore compel the opposite party to take his answer relative to the matter imputed, as otherwise you might go on to try a collateral issue; and if you were allowed to try the collateral issue of the

(*t*) Bk. 3, pt. 1, ch. 1.(*u*) *id.*(*x*) 11 Jurist, 478, 479.(*y*) P. 481.



witness having committed some offense, you might call witnesses to prove that fact, and they again might likewise be cross-examined as to their own conduct; and so you might go on proving collateral issues without end, before you could come to the main one. The rules of evidence stop this in the first instance or the more convenient administration of justice; and you must therefore take the witness's answer and indict him for perjury if it is false." 2. By showing that he has on former occasions made statements inconsistent with the evidence he has given. But this is limited to such evidence as is relevant to the cause: for a witness can not be contradicted on collateral matters. (2) The 17 & 18 Vict. c. 125, s. 23, enacts: "If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." And this enactment, which was originally applicable only to courts of civil judicature, has now, by the 28 & 29 Vict. c. 18, ss. 1 and 4, been extended to all courts of judicature, as well criminal as all others; and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence. 3. By proving misconduct connected with the proceedings, or other circumstances showing that he does not stand indifferent between the con-

(2) 1 Stark. Evid. 189, 3rd Ed.; 2 Ph. Evid. 517 *et seq.*, 10th Ed.

tending parties. (*a*) Thus it may be proved that a witness has been bribed to give his evidence, (*b*) or has offered bribes to others to give evidence for the party whom he favors, (*c*) or that he has used expressions of animosity and revenge towards the party against whom he bears testimony, (*d*) &c. We must also direct attention to the following observations of Parke, B., in the *Attorney-General v. Hitchcock* : (*e*) "Under the old law, when an objection was raised to the competency of a witness, he might be examined as to it on the *voir dire*, and evidence might be adduced to contradict his statement; and the issue thus raised was determined by the judge. . . . At that time those objections went to the disability of the witness; but it becomes an important question, whether the same course should be adopted now, since Lord Denman's Act, 6 & 7 Vict. c. 85, has provided, that no person shall be excluded from giving evidence by reason of incapacity from crime or interest—is all evidence of his being interested to be excluded from the view of the jury?" This suggestion does not, however, appear to be followed in practice.

**645.** 6. With respect to the right of a party to discredit his own witnesses. We will consider the matter, first, as it stood at the common law, and secondly, under the 17 & 18 Vict. c. 125, and 28 & 29 Vict. c. 18. First, then, of the common law. It was an established rule, that a party should not be allowed to

(*a*) There are some authorities to the contrary; but they seem overruled by the *Attorney-General v. Hitchcock*, 1 Exch. 91; 11 Jur. 478, and the cases there cited; and are indefensible on principle.

(*b*) *Langhorn's case*, 7 Ho. St. Tr. 446, recognized in the *Attorney-General v. Hitchcock*, 1 Exch. 91; 11 Jur.

478.

(*c*) *Lord Stafford's case*, 7 Ho. St. Tr. 1400, recognized in the *Attorney-General v. Hitchcock*, 1 Exch. 91; 11 Jur. 478.

(*d*) *Yewin's case*, 2 Camp. 638. See *ad id.* the *Attorney-General v. Hitchcock*, 1 Exch. 91; 11 Jur. 478.

(*e*) 11 Jurist, 478, 480.

give general evidence to discredit his own witness, *i. e.* general evidence that he is unworthy of belief on his oath. By calling the witness, a party represents him to the court as worthy of credit, or at least not so infamous as to be wholly unworthy of it; and if he afterwards attack his general character for veracity, this is not only *mala fides* towards the tribunal, but, say the books, it "would enable the party to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand for destroying his credit if he spoke against him." (*f*) A party might, however, discredit his own witness collaterally, by adducing evidence to show that the evidence which he gave was untrue in fact. (*g*) This does not raise the slightest presumption of *mala fides*; and it would be in the highest degree unjust and absurd, if parties were bound by the unfavorable statements of witnesses with whom they may have no privity, and who are frequently called by them from pure necessity. But whether it was competent for a party to show, that his own witness had made statements out of court, inconsistent with the evidence which he had given in it, was an unsettled point, on which, however, the weight of authority was in favor of the negative. (*h*) On the one hand it was urged, that this falls within the principle of the general rule, that a party must not be allowed directly to discredit his own witness; (*i*) that, to admit proof of contradictory statements would tend to multiply issues; that it would enable a party to get the naked statement of a witness before the jury, operating in fact as substan-

(*f*) B. N. P. 297; 2 Phill. Ev. 525, 10th Ed. Ev. § 1049, 1st Ed.; 2 Ph. Ev. 528 *e. seq.* 10th Ed.; and *Melhuish v. Collier*.

(*g*) 2 Ph. Ev. 526, 10th Ed.

15 Q. B. 878.

(*h*) See the cases collected, *Tayl.*

(*i*) Ph. & Am. Ev. 904.

tive evidence; (*k*) that there should be some danger of collusion and dishonest contrivance, inasmuch as a witness might be induced to make a statement out of court, for the very purpose of its being reserved, and afterwards used to contradict him; and that the jury might regard such a statement as substantive evidence in the cause. Moreover, the use of oaths and the other sanctions of truth is to extract facts which parties might be willing to conceal; and the allowing a witness to be thus contradicted holds out an inducement to him to maintain by perjury in court any false or hasty statements he may have made out of it. The following reasoning on the other side is taken from a work of authority: (*l*) "It may be argued, the evidence is not open to the objection, that the party would thus discredit his own witness by general testimony that, although a party who calls a person of bad character as a witness, knowing him to be such, ought not to be allowed to defeat his testimony because it turns out unfavorable to him, by direct proof of general bad character,—yet it is only just that he should be permitted to show, if he can, that the evidence has taken him by surprise, and is contrary to the examination of the witness, preparatory to the trial; that this course is necessary, as a security against the contrivance of an artful witness, who otherwise might recommend himself to a party by the promise of favorable evidence (being really in the interest of the opposite party), and afterwards by hostile evidence ruin his cause; that the rule, with the above exception, as to offering contradictory evidence, ought to be the same, whether the witness is called by the one party or the other; and that the danger of the jury's treating the contradictory matter as substantive testimony, is the same in both cases;

(*k*) Tayl. Ev. § 1048, 1st Ed.(*l*) Ph. & Am. Ev. 905.

that, as to the supposed danger of collusion, it is extremely improbable, and would be easily detected. It may be further remarked, that this is a question in which, not only the interests of litigating parties are involved, but also the more important general interests of truth, in criminal as well as in civil proceedings; that the ends of justice are best attained, by allowing a free and ample scope for scrutinizing evidence and estimating its real value; and that in the administration of criminal justice, more especially, the exclusion of the proof of contrary statements might be attended with the worst consequences." Besides, it by no means follows, that the object of a party in contradicting his own witness is to 'impeach his veracity—it may be to show the faultiness of his memory. (*ll*)

In this state of the law the 17 & 18 Vict. c. 125, s. 22, was passed—which was originally applicable only to civil courts, (*m*) but has since been extended (*n*) to all courts of judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive and examine evidence,—and which enacts, that "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." And it has been held

(*l*) Tayl. Ev. § 1047, 1st Ed.

(*n*) 28 & 29 Vict. c. 18, ss. 1, 3.

(*m*) See sect. 103.

by the Court of Common Pleas, that the term "adverse" in this section, must be understood in the sense of the witness exhibiting a hostile mind towards the party calling him, and not merely in the sense that his testimony turns out to be "unfavorable" to that party; (*o*) and by the Court of the Queen's Bench, that a statement contradicting the evidence of a witness under it, may be contained in a series of documents, not one of which, taken by itself, would amount to a contradiction of the witness. (*p*)

646. 7. While the indefinite, or even frequent adjournment of its proceedings, is at variance with the very nature of a judicial tribunal, (*q*) still a power of adjournment in certain cases, exercised with due caution and discretion, is indispensable to the sound and complete administration of justice. As regards criminal cases, it is said that it is incident to a criminal trial, that the court may, for sufficient reason, adjourn it. (*r*) But this rule seems not to have been recognized in civil cases,—a point as to which the Commissioners for inquiring into the process, practice, and system of pleading in the Superior Courts of Common Law, express themselves as follows: (*s*) "It occasionally happens that a party is taken by surprise by his adversary's case; that a witness or a document becomes unexpectedly necessary, and is not forthcoming; that a document turns out to be attested, and the attesting witness is not present; or requires a stamp, but no stamp, or an insufficient one, has been affixed. In these and the like cases, miscarriage of justice must occur unless time is afforded to enable

(*o*) *Greenough v. Eccles*, 5 C. B., N. S. 786.

(*p*) *Jackson v. Thomason*, 1 B. & S. 745.

(*q*) *Introd.* pt. 2, §§ 41 *et seq.*

(*r*) *Per Blackburn, J., R. v. Castro* L. Rep., 9 Q. B. 350, 356.

(*s*) *Second Report*, p. 10.

the deficient matter to be supplied. We think the rigorous inflexibility with which a cause once commenced is now carried on to its close, might be modified with advantage. No doubt, encouragement should not be held out to parties to be negligent in getting up their proofs or coming unprepared to trial; but, on the other hand, it is important not to allow justice to miscarry, or parties to be put to the expense of another trial, when, by a temporary adjournment, a deficiency in proof may be supplied." And these views have been carried into effect by 17 & 18 Vict. c. 125, s. 19, which enacts, that "It shall be lawful for the court or judge, at the trial of any cause, where they or he may deem it right for the purposes of justice, to order an adjournment for such time, and subject to such terms and conditions as to costs, and otherwise, as they or he may think fit."

647. 8. There were formerly two ways of questioning the ruling of a court or judge, on matters of evidence in civil cases. 1. By bill of exceptions founded on the statute West. 2 (13 Edw. I.) c. 31, stat. 1:— "Cum aliquis implacitatus coram aliquibus justiciariis, proponat exceptionem, et petat quod justiciarii eam allocent, quam si allocare noluerint, si ille, qui exceptionem proponet, scribat illam exceptionem et petat quod justiciarii apponant sigilla in testimonium, justiciarii sigilla sua apponant; et si unus apponere noluerit, apponat alius de societate." And if a judge refused to seal a bill of exceptions, the party might have a compulsory writ against him, commanding him to seal it if the fact alleged were truly stated; and if he returned that the fact was untruly stated, when the case was otherwise, an action would lie against him for making a false return. (t)

(t) 3 Blackst. Comm. 372.

But, by the "Supreme Court of Judicature Act, 1873," (*u*) bills of exceptions and proceedings in error are now abolished.

2. The improper admission or rejection of evidence, was also a ground for an application to the court in banc for a new trial. And this mode of proceeding was generally adopted in preference to that by bill of exceptions, partly through the absurd notion, that the tendering a bill of exceptions was disrespectful to the judge; but principally to avoid expense and delay. But the court would often refuse a new trial, even where an undoubted error had been committed by the judge, if they thought that under all the circumstances justice had been done; (*x*) and now, by the "Supreme Court of Judicature Act, 1873," (*y*) a new trial shall not be granted on the ground of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the court to which the application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such court, that such wrong or miscarriage affects part only of the matter in controversy, the court may give final judgment as to part thereof, and direct a new trial as to the other part only.

**648.** 2. As to criminal cases. It is said that bills of exceptions do not lie in such cases (*z*)—and they are certainly never seen in practice. But the Court of Queen's Bench will grant a new trial in certain cases

(*u*) 36 & 37 Vict. c. 66, sched., rule 49.

(*x*) *Atkinson v. Pocock*, 12 Jurist, 60, and the cases there cited; *Cox v. Kitchin*, 1 Bos. & P. 338; *Wickes v. Clutterbuck*, 2 Bing. 483; *Doe d. Welsh v. Langfield*, 16 M. & W. 497;

*Mortimer v. M'Callan*, 6 Id. 58

*Bessey v. Wyndham*, 6 Q. B. 166

*Stindt v. Roberts*, 5 D. & L. 460.

(*y*) 36 & 37 Vict. c. 66, sched., rule 48.

(*z*) Ph. & Am. Ev. 947; 2 Ph. Evid. 541-2, 10th Ed.



of misdemeanor; (*a*) and on one occasion it did so in a case of felony. (*b*) But the propriety of this decision is questionable; (*c*) and the Privy Council, in a recent case, refused to be bound by it. (*d*) Formerly, when the judge before whom a criminal cause was tried at the Central Criminal Court, or on circuit, entertained a doubt on any point of law or evidence, he reserved the question for the consideration of the judges of the superior courts, who heard it argued, and if they thought the accused improperly convicted, recommended a pardon. But the judges sitting in this way had no jurisdiction as a court, and were only assessors to advise the judge by whom the matter was brought before them. By 11 & 12 Vict. c. 78, however, this was altered; and a regular tribunal, consisting of at least five of the judges of the superior courts at Westminster (including one of the Chief Justices or the Chief Baron), was constituted, for the decision of all points reserved on criminal trials by any court of oyer and terminer, or jail delivery, or court of quarter sessions. But neither under the old practice nor under this statute, have the parties to a criminal proceeding any compulsory means of reviewing the decision of the judge.

(*a*) Archb. Cr. Off. Pract. 96, 97; R. v. Whitehouse, 1 Dears. C. C. 1; R. v. Russell, 3 E. & B. 942.

(*b*) R. v. Scaife, 2 Den. C. C. 281.

(*c*) See the note to that case, 2 Den. C. C. 286; also R. v. Russell, 3 E. &

B. 942, 950, per Lord Campbell; R. v. Mawbey, 6 T. R. 619, 638, per Lord Kenyon.

(*d*) R. v. Bertrand, L. Rep., 1 P. C. 520.

## PART II.

## ELEMENTARY RULES FOR CONDUCTING THE EXAMINATION AND CROSS-EXAMINATION OF WITNESSES.

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649. In the preceding Part, the main object of this work was brought to a close. The final one, at which we have now arrived, will be devoted, not to law or practice, but to elementary rules for the guidance of advocates in dealing with witnesses. Much of what follows will doubtless appear very obvious to

readers experienced in such affairs, but it is not for them that this Part is intended. (a)

650. There is a very prevalent notion that all discussion or comment on this subject is necessarily useless, if not worse. This seems to have arisen partly from a superficial view of the matter, and partly from misapprehension of a passage in Quintilian, in which he is supposed to intimate his opinion, that the faculty of interrogating witnesses with effect must be the result either of natural acuteness or of practice. If the Roman critic meant, what he certainly does not express—his language being “*Naturali magis acumine, aut usu contingit hæc virtus*”—that no rules can be laid down for the guidance of advocates in this respect, he was most inconsistent with himself; for in the very

(a) This part being designed solely for those whose forensic experience has either not commenced, or is very limited, we may perhaps be excused for inserting the following judicious advice given to young advocates by some eminent foreign writers: “A young man ought to present himself with an honest assurance and plead with firmness, but with modesty in his language and demeanor. He should avoid the affectation of fetching things from too far, and should not wander from his subject. If he demands a favorable hearing, let him do it with dignity, and not in a rampant tone. He ought neither exalt himself too much, nor humble himself too much, and the less he can manage to talk about himself the better. If either the manner or matter of his discourse affords room for criticism, he should bear it patiently. The best works are subject to that; and a young man, especially, must not flatter himself with being all at once above paying this tribute, from which even those who have grown old in the

career are not exempt.” *Histoire abrégée de l'Ordre des Avocats*, par M. Boucher d'Argis, ch. II. The reader will find this in M. Dupin's work, entitled “*Profession d'Avocat, Recueil de Pièces contenant l'Exercice de cette Profession.*” A good warning is likewise to be found in the following: “*Alii memoriæ auditorum consulturi, solis inhærebant conclusionibus, easque modo per caussarum genera, quæ vocant, modo per quæstiones disponebant: modo se præclare suo functos officio existimabant, si ad singulos titulos aliquot casuum leviter enucleatorum centurias proponerent. . . . Illi ad memoriam omnia referebant, et si qui jejuna ista præcepta edidicerant, et ad singulas quæstiones ipsa compendii verba poterant reddere, eos aliquot casuum et quæstiuncularum myriadibus suffarcinatos, et phaleris ornatos doctoralibus, ablegabant in forum, strepitum his armis non sine horrore judicis daturus.*” Heineccius, ad Inst. Præf. p. ix.

chapter from which the above passage is taken, (*b*) he gives a series of rules for that purpose, which have been admired in every age, and are recommended by high authorities in our own law. (*c*) The present chapter is in truth chiefly founded on them, as the constant references will show. It would indeed be strange if, while perfection in all other arts and sciences is attained by the combination of study and experience, the faculty of examining witnesses with effect—which depends so much on knowledge of human nature, and acquaintance with the resources of falsehood and evasion, and is coeval with judicature itself—should be destitute of all fixed principles.

**651.** The terms “examination-in-chief” and “cross-examination” are commonly applied, respectively, to the interrogation of witnesses by the party who presents them to the tribunal and by his adversary; the legal rules of practice governing both being, as has been shown in the preceding Part, (*d*) mainly based on the principle that every witness produced ought in the first instance at least, to be presumed favorably disposed toward the party by whom he is called. The very opposite is, however, often the fact; and accordingly in what follows the term “cross-examination” will be used in the sense of “examination *ex adverso* ;” (*e*) *i. e.*, the interrogation by an advocate of a witness hostile to his cause, without reference to the form in which the witness comes before the court.

(*b*) Quintil. Inst. Orat. lib. 5, cap. 7, De Testibus. Quintilian refers to the dialogues of the Socratic philosophers, and especially those of Plato, as affording good studies in the art of cross-examination. Among Plato's Divine Dialogues, see in particular the Protagoras, Second Alcibiades,

Theages, and Eutyphron.

(*c*) 3 Blackst. Comm. 374; Ph. & Am. Ev. 908; 1 Greenl. Evid. § 446 note(1), 7th Ed.

(*d*) *Supra*, pt. 1, ch. 2, §§ 641, 642.

(*e*) 1 Benth. Jud. Ev. 496 and 500.

652. In the former of these cases, *i. e.*, in the interrogation of witnesses favorable to the cause of the advocate by whom they are interrogated, the following advice is given by Quintilian, in the part of his work to which reference has been made: "Si habet testam cupidum lædendi, cavere debet hoc ipsum, ne cupiditas ejus appareat; nec statim de eo quod in judicium venit rogare, sed aliquo circuitu ad id pervenire, ut illi, quod maximè dicere voluit, videatur expressum; nec niniùm instare interrogationi, ne ad omnia respondendo testis fidem suam minuat; sed in tantum evocare eum, quantum sumere ex uno satis sit." (*f*)<sup>1</sup> So, when the disposition of the witness towards his cause is unknown to the advocate: "Si nesciet actor quid propositi testis attulerit: paulatim, et (ut dicitur) pedetentim interrogando experietur animum ejus, et ad id responsum quod eliciendum erit, per gradus ducet. Sed, quia nonnunquam sunt hæ quoque testium artes, ut primò ad voluntatem respondeant, quo majore fide diversa postea dicant, est oratoris, suspectum testem dum prodest, dimittere." (*g*)<sup>2</sup> In another part of the same chapter

(*f*) Quint. *in cas. cit.*

(*g*) Id.

<sup>1</sup> "If he find the witness disposed to prejudice the accused, he ought to take the utmost care that his disposition may not show itself; and he should not question him at once on the point for decision, but proceed to it circuitously, so that what the examiner chiefly wants him to say, may appear to be wrung from him. Nor should he press him with too many interrogatories, lest the witness, by replying freely to everything, should invalidate his own credit; but he should draw from him only so much as it may seem reasonable to elicit from one witness."

<sup>2</sup> "But if the accuser be ignorant of the witness's disposition, he must sound his inclination cautiously, interrogating him, as we say, step by step, and leading him gradually to the answer which is necessary to be elicited from him. But as there is sometimes such art in witnesses that they answer at

he adds : " *Illæ verò pessimæ artes, testem subornatum in subsellia adversarii mittere, ut inde excitatus plus noceat, vel dicendo contra reum, cum quo sederit ; vel quùm adjuvisse testimonio videbitur, faciendo ex industriâ multa immodestè atque intemperanter, per quæ non à se tantùm dictis detrahat fidem, sed cæteris quoque, qui profuerant, auferat auctoritatem ; quorum mentionem habui, non ut fierent, sed ut vitarentur.*" <sup>1</sup>

653. On the subject of "cross-examination," or "examination ex adverso," the following celebrated passages of the same author should be attentively studied : (*h*) "In eo qui verum invitus dicturus est prima felicitas interrogantis est extorquere quod is noluerit. Hoc non alio modo fieri potest, quam longius interrogatione repetita. Respondebit enim quæ nocere causæ non arbitrabitur : ex pluribus deinde quæ confessus erit eò perducetur, ut, quod dicere non vult, negare non possit. Nam, ut in oratione sparsa plerumque colligimus argumenta, quæ per se nihil reum aggravare videantur, congregatione deinde eorum factum convincimus ; ita hujusmodi testis multa de anteactis, multa de insecutis, loco, tempore, per-

(*h*) Quint. *in cap. cit.*

first according to an examiner's wish, in order to gain greater credit, when they afterwards speak in a different way, it is wise in an orator to dismiss a suspected witness before he does any harm."

<sup>1</sup> "As to those disgraceful practices of sending a suborned witness to sit on the benches of the opposite party, that in being called from thence, he may do him the more damage, either by speaking directly against the person on whose side he has placed himself, or by assuming, after having appeared to benefit him by his evidence, airs of impudence and folly, by which he not only discredits his own testimony, but detracts from the weight of that of others who may have been of service—I mention them, not that they may be adopted, but that they may be shunned."

sonâ, cæterisque est interrogandus, ut in aliquod responsum incidat, post quod illi vel fateri quæ volumus, necesse sit, vel iis quæ jam dixerit repugnare. Id si non contingit, reliquum erit, ut eum nolle dicere manifestum sit : protrahendusque, ut in aliquo quod vel extra causam sit, deprehendatur : tenendus, etiam dintius, ut omnia, ac plura quàm res desiderat, pro reo dicendo, suspectus judici fiat ; quo non minùs nocebit, quam si vera in reum dixisset." . . . . .

"Primum est, nosse testem. Nam, timidus terreri, stultus decipi, iracundus concitari, ambitiosus inflari, longus protrahi potest : prudens verò et constans, vel tanquam inimicus et pervicax dimittendus statim ; vel non interrogatione, sed brevi interlocutione patroni refutandus est ; aut aliquo, si continget, urbane dicto refrigerandus ; aut, si quid in ejus vitam dici poterit, infamia criminum destruendus. Probos quosdam et verecundos non asperè incessere profuit ; nam sæpe, qui adversùs insectantem pugnassent, modestia mitigantur. Omnis autem interrogatio aut in causa est, aut extra causam. In causa, patronus altiùs, et unde nihil suspecti sit, repetita percontatione, priora sequentibus applicando, sæpe eò perducit homines, ut invitis quod prosit extorqueat. . . . . Illud fortuna interdum præstat, ut aliquid quod inter se parum consentiat, a teste dicatur : interdum (quod sæpius evenit,) ut testis testi diversa dicat : acuta autem interrogatio, ad hoc quod casu fieri solet, etiam ratione perducet. Extra causam, quoque, multa quæ prosint, rogari solent ; de vita testium aliorum, de sua quisque, si turpitudine, si humilitas, si amicitia accusatoris, si inimicitia cum reo ; in quibus aut dicant aliquid quod prosit, aut in mendacio vel cupiditate lædendi deprehendantur. Sed in primis interrogatio debet esse circumspecta, quia multa contra patronos venuste testis

sæpe respondet, eique præciquè vulgò favetur. Tum verbis quàm maxime ex medio sumptis, ut, qui rogatur (is autem sæpius), intelligat, aut ne intelligere se neget, quod interrogantis non leve frigus est.”<sup>1</sup>

<sup>1</sup> “ But in the case of one who will not speak the truth unless against his will, the great happiness in an examiner is to extort from him what he does not wish to say ; and this can not be done otherwise than by questions that seem wide of the matter in hand, for to these he will give such answers as he thinks will not hurt his party, and then, from various particulars which he may confess, he will be reduced to the inability of denying what he does not wish to acknowledge. For, as in a set speech, we commonly collect detached arguments, which, taken singly, seem to bear but lightly on the accused, but by combination of which we succeed in proving the charge, so a witness of this kind must be questioned on many points regarding antecedent and subsequent circumstances, and concerning times, places, persons, and other subjects, so that he may be brought to give some answer, after which he must either acknowledge what we wish, or contradict what he himself has said. If we do not succeed in that object, it will then be manifest that he is unwilling to speak ; and he must be led on to other matters, that he may be caught tripping, if possible, on some point, though it be unconnected with the cause. He may also be detained an extraordinary time, that by saying everything, and more than the case requires, in favor of the accused, he may make himself suspected by the judge ; and he will thus do no less damage to the accused than if he had stated the truth against him. . . . In this part of our duty, the principal point is to know the witness well ; for if he is timid, he may be frightened ; if foolish, misled ; if irascible, provoked ; if vain, flattered ; if prolix, drawn from the point. If, on the contrary, a witness is sensible and self-possessed, he may be hastily dismissed, as malicious and obstinate, or he may be confuted, not with formal questioning, but with a short address from the defendant’s advocate, or he may be put out of countenance, if opportunity offer, by a jest, or, if anything can be said against his moral character, his conduct may be overthrown on infamous charges. It has been advantageous, on certain occasions, not to press too severely on men of probity and modesty ; for those who would have fought against a determined assailant, are softened by



**654.** In dealing with examination *ex adverso*, we propose to consider separately the cases: 1°. Where the evidence of the witness is false in toto. 2°. Where a portion of it is true, but a false coloring is given by the witness to the whole transaction to which he deposes—either by the suppression of some facts, or the addition of others, or both. 1. Of the former of these the most obvious, though not the most usual case, is where the answers extracted show that the fact deposed to is physically impossible. A good instance

gentle treatment. Every question is either about some point within the cause, or on some point without it. On matters within the cause, the advocate of the accused, as we also directed the accuser, may frequently, by putting questions a little widely, and on subjects from which no suspicion will arise, and by comparing previous with subsequent answers, reduce witnesses to such a dilemma as to extort from them, against their will, what may be of service to his own cause. . . . Fortune sometimes favors us by causing something to be said by a witness that is inconsistent with the rest of his evidence, and sometimes (as more frequently happens) she makes one witness say what is at variance with the evidence of another; but an ingenious mode of interrogation will often lead methodically to that which is so frequently the effect of chance. On matters without the cause, also, many serviceable questions are often put to a witness: as concerning the character of other witnesses; concerning his own; whether anything dishonorable or mean can be laid to the charge of any of them; whether they have had any friendship with the prosecutor, or enmity against the defendant—in replying to which they are likely to say something of which we may take advantage, or may be convicted of falsehood or malevolence. But all questioning ought to be extremely circumspect, because a witness often utters sharp repartees in answer to the advocates, and is thus regarded with a highly favorable feeling by the audience in general. Questions should be put, too, as far as possible, in familiar language, that the person under examination, who is very frequently illiterate, may clearly understand, or at least may not pretend that he does not understand—an artifice which throws no small damp on the spirits of the examiner.”

is afforded by the case of the Comte de Morangiés. (*i*) "The question was, whether Monsieur de Morangiés had received a sum of three hundred thousand francs, for which he had given notes of hand to a person called Véron. These notes of hand he affirmed had been obtained from him fraudulently. Dujonquai, grandson of Véron affirmed that he had himself on foot transported that sum to Morangiés, at his hotel, in thirteen journeys, between seven in the morning and about one in the afternoon making about five hours and a half or six hours. The fact was shown to be impossible, as follows. Dujonquai said that he had divided the sum into thirteen bags, each containing six hundred louis, and twenty-three other sacks of two hundred pounds; twenty-five louis were given to Dujonquai by Morangiés. On each occasion Dujonquai put a sack of two hundred louis in each of his pockets, which, according to the fashion of the day, flapped over his thighs, and took a sack of six hundred guineas under his arm. According to the measured distance from the alley in which Dujonquai lived, to the house of Morangiés, the space traversed by Dujonquai, in his thirteen journeys, would amount to five French leagues and a half; the time for each league being calculated at an hour for a person walking rather faster than usual. So far there is no absolute physical impossibility, however improbable it might be, that Dujonquai should not stop a moment for refreshment or repose; but in going, Dujonquai had sixty-three steps to come down in his own house, and twenty-seven to go up at that of Morangiés, making in all ninety multiplied by twenty-six; this amounted to two thousand three hundred and forty steps. Now it was known, that to ascend the three hundred and eighty steps of Nôtre Dame

(*i*) We cite from the Law Magazine, N. S. vol. i. p. 24.

from eight to nine minutes are requisite. Thus an hour must be deducted from the five or six during which the journeys were said to have been made. The street of St. Jacques, which Dujonquai had to ascend, is extremely steep. This would check the speed of a man laden and encumbered with bags of gold under his arm and in his pockets. The street is a great thoroughfare, especially in the morning, for three to six hours. The obstructions inevitable from this circumstance would accumulate considerably; half a league at least must be added to the five leagues and a half, which, as the crow flies, was the distance traversed. It happened that on the very day which Dujonquai fixed upon for his journeys, these ordinary obstructions were increased, from the removal by sixty or eighty workmen of an enormous stone to St. G  n  vi  ve, and the crowd attracted by the spectacle. This must, even supposing him not to have yielded for a moment to the curiosity of seeing what attracted others, have added seven or eight minutes to each of his walks, which, in the twenty-six, would amount to two hours and a half. Both in his own house and that of Morangi  s it must have been necessary for Dujonquai to open and shut the doors, to take the sacks, to place them in his pockets, to take them out, to lay them before Morangi  s, who he affirmed, contrary to all probability, counted the sacks during the intervals of his journey, and not in his presence. Time must have been requisite also to take and read the receipts given by the count, during each journey. On his return home Dujonquai must have given them to some other person. Therefore, reckoning the time required to take and lay down the sacks, to open and shut the doors, to receive and read and deliver the acknowledgments, to conversations which Dujonquai allowed he

had with several people, together with the obstacles we have mentioned, the truth of Dujonquai's statement was reduced to a physical impossibility."

**655.** 2. Cases like the above are, however, necessarily uncommon; in most instances the exertions of the advocate must be directed to showing the improbability, or at most the moral impossibility, of the fact deposed. The story of Susannah and the Elders in the Apocrypha affords a very early and most admirable example. The two false witnesses were examined out of the hearing of each other: on being asked under what sort of tree the criminal act was done, the first said "a mastick tree," the other "a holm tree." The judgment of Lord Stowell also in *Evans v. Evans* (*k*) shows how a supposed transaction may be disproved, by its inconsistency with surrounding circumstances. "What had you for supper?" says a modern jurist. (*l*) "To the merits of the cause, the contents of the supper were in themselves altogether irrelevant and indifferent. But if, in speaking of a supper given on an important or recent occasion, six persons, all supposed to be present, give a different bill of fare, the contrariety affords evidence pretty satisfactory, though but of the circumstantial kind, that at least some of them were not there." The most usual application of this is in detecting fabricated alibis. These seldom succeed if the witnesses are skillfully cross-examined out of the hearing of each other; especially as courts and juries are aware that a false alibi is a favorite defense with guilty persons, and consequently listen with suspicion even to a true one.

**656.** 2°. Falsehood in toto is far less common than misrepresentation. 1. Under this head comes exaggeration—the dangers of which have been pointed

(*k*) 1 Hagg. Cons. Rep. 105.

(*l*) 2 Benth. Jud. Ev. 9.

out in the Introduction, (*m*) There are, however, other forms. (*n*) *E. g.*, "Question—About what thickness was the stick with which you saw Reus strike his wife Defuncta? Answer—About the thickness of a man's little finger. In truth it was about the thickness of a man's wrist. Falsehood in this shape may be termed falsehood in quantity. Question—With what food did the jailor Reus feed the prisoner Defunctus? Answer—With sea biscuit, in an ordinary eatable state. In truth, the biscuit was rotten and mouldy in great part. Falsehood in this shape may be termed falsehood in quality."

657. 2. Evasion. Of the various resorts of evasion, the most obvious and ordinary are generality and indistinctness. "*Dolus versatur in generalibus.*" (*o*) "*Dolus versatur in universalibus.*" (*p*) "*Multi-plex indistinctum parit confusionem.*" (*q*) Untruthful witnesses, as well as unreflecting persons, commonly use words expressing complex ideas, and entangle facts with their own conclusions and inferences. *E. g.*, Question—What did A. B. (*i. e.*, the plaintiff, defendant, &c., as the case may be) do? or say? Answer—"He promised," "He engaged," "He authorized," "He ratified," "He confessed," "He admitted," "It was understood," &c., &c., &c. The mode of detection here, is to elicit by repeated questions what actually did take place, thus breaking up the complex idea into its component parts, and separating the facts from the inferences. 2. Another form is that of "equivocation," or verbal truth telling—a practice much resorted to by witnesses who are regardless of their

(*m*) Pt. 1, § 26.

(*p*) 2 Bulst. 226; 1 Rol. 157.

(*n*) 1 Benth. Jud. Ev. 141.

(*q*) Hob. 335. See 2 Benth. Jud.

(*o*) 2 Co. 34a; 3 Co. 81a; Wing M. Ev. 147.

oaths ; as also by others who delude themselves into the belief that deception in this shape is, in a religious and moral point of view, either not criminal, or criminal in a less degree than actual falsehood. “Perjuri sunt qui, servatis verbis juramenti, decipiunt aures eorum qui accipiunt.” (r)

658. The maxim “falsus in uno, falsus in omnibus,” (s) may be pushed too far. It must not be supposed that all the untrue testimony given in courts of justice proceeds from an intention to mistate or deceive. On the contrary, it must usually arise from interest or bias in favor of one party, which exercises on the minds of the witnesses an influence of which they are unconscious, and leads them to give distorted accounts of the matters to which they depose. Again, some witnesses have a way of compounding with their consciences—they will not state positive falsehood, but will conceal the truth, or keep back a portion of it; while others, whose principles are sound and whose testimony is true in the main, will lie deliberately when questioned on particular subjects, especially on some of a peculiar and delicate nature. The mode of extracting truth by cross-examination is, however, pretty much the same in all cases; namely, by questioning about matters which lie at a distance, and then showing the falsehood of the direct testimony by comparing it with the facts elicited.

659. Although in enumerating the means by which adverse witnesses are to be encountered, Quintilian puts first, (t) “timidus (testis) terri potest,” still, menacing language and austerity of demeanor are not the most efficacious weapons for this purpose. For, although there are cases in which they may be em-

. (r) 3 Inst. 166.

(t) *Supra*, § 653.

(s) Broom's Max. xxviii. 4th Ed.

ployed with advantage, still in the vast majority of instances a mendacious, an untruthful, or an evasive witness is far more effectually dealt with, by keeping him in good humor with himself, and putting him off his guard with respect to the designs of his interrogator. The terror of which Quintilian here speaks, must be understood with reference to a feeling of uneasiness occasioned by remorse of conscience, a sense of shame, a dread of disgrace and punishment, and a sort of undefined apprehension resulting from them all. The witness who is giving false testimony, rarely knows what means the interrogator possesses of detecting and exposing him, far less those which may start up at any moment from the auditory at the trial. (u) But the hardened villian who comes into the witness-box prepared to swear to unmingled falsehood, and who perseveres in that intention despite every obstacle and every warning, is comparatively rare. On most minds the sanctions of truth (x) are in continual, though it may be silent, operation; and the iniquitous design of a witness to mislead or deceive a tribunal, has frequently yielded to the force of these when judiciously displayed to his mental vision. Here, and indeed in examinations *ex adverso* in general, the great art is to conceal, especially from the witness, the object with which the interrogator's questions are put. One mode of accomplishing this is by questioning the witness on indifferent matters, in order by diverting his attention to cause him to forget the answer which it is desired to make him contradict. In a case of murder, to which the defense of insanity was set up, a medical witness, called on the part of the accused, swore that, in his judgment, the accused at the time he killed the de-

(u) See bk. 1, pt. 1, § 100.

(x) See Introd. pt. 1, §§ 16-20, and pt. 2, §§ 55-59.

ceased was affected with a homicidal mania, and urged to the act by an irresistible impulse. The judge, dissatisfied with this, first put to the witness some questions on other subjects, and then asked him, "Do you think the accused would have acted as he did, if a policeman had been present?" to which the witness at once answered in the negative; on which the judge remarked, "Your definition of irresistible impulse then must be, an impulse irresistible at all times except when a policeman is present."

660. But if cross-examination is a powerful engine, it is likewise an extremely dangerous one, and often recoils fearfully, even on those who know how to use it. The young advocate should reflect that, if the transaction to which a witness speaks really occurred, so constant is the operation of the natural sanction of truth, (*y*) that he is almost sure to recollect every material circumstance by which it was accompanied; and the more his memory is probed on the subject, the more of these circumstances will come to light, thus corroborating instead of shaking his testimony. And forgetfulness on the part of witnesses, of immaterial circumstances not likely to attract attention, or even slight discrepancies in their testimonies respecting them, so far from impeaching their credit, often rather confirms it. Nothing can be more suspicious than a long story, told by a number of witnesses who agree down to the minutest details. Hence it is a well-known rule, that a cross-examining advocate ought not, in general, to ask questions the answers to which, if unfavorable, will be conclusive against him; as, for instance, in a case turning on identity, whether the witness is sure, or will swear, that the accused is the



man of whom he is speaking. The judicious course is to question him as to surrounding or even remote matters; his answers respecting which may show that, in the testimony he gave in the first instance, he either spoke falsely or was mistaken. Under certain circumstances, however, perilous questions must be risked; especially where a favorable answer would be very advantageous, and things already press so hard against the cause of the cross-examining advocate, that it could scarcely be injured by an unfavorable one.

661. The words "longus (testis) protrahi (postest)," (z) are omitted in some copies of Quintilian but are retained in the best editions, and have every appearance of genuineness. Their meaning is, that a witness who, either from self-importance, a desire to benefit the cause of the opposite party, or any other reason, displays a loquacious propensity, should be encouraged to talk, in order that he may either fall into some contradiction, or let drop something that may be serviceable to the party interrogating. "Of this damning kind," observes the author of a judicious pamphlet, (a) "are witnesses who prove too much; for instance, that a horse is the better for what the consent of mankind calls a blemish or a vice. The advocate on the other side never desires stronger evidence than that of a witness of this sort: he leads the

(z) *Supra*, § 653.

(a) Hints to Witnesses in Courts of Justice, by a Barrister (Baron Field). London. 1815. We cite from the *Law Mag.* vol. 25, p. 361. When corporal punishment in the army excited so much interest some time since—one party denouncing it as useless cruelty, and the other insisting on it as indispensable to the government of an army—the author met an officer who warmly defended the practice; and,

having first taken care to ascertain that none of his hearers had witnessed a military flogging, assured them, with great earnestness, that there was nothing in it; he had seen a soldier receive nine hundred and fifty lashes, and not mind it in the least. It never occurred to this zealous person, that if that were true, the usual punishments of 50, 100, or 350 lashes, could not be a very effective means of enforcing military discipline.

witness on from one extravagant assertion in his friend's behalf to another ; and, instead of desiring him to mitigate, presses him to aggravate, his partiality ; till at last he leaves him in the mire of some monstrous contradiction to the common sense and experience of the court and jury ; and this the advocate knows will deprive his whole testimony of credit in their minds.

662. The course of cross-examination to be pursued in each particular cause, should be subordinate to the plan which the advocate has formed in his mind for the conduct of it. Writers on the art of war, to which forensic battles have so often been compared, lay down as a principle, that every campaign should be conducted with some definite object in view ; or, as they express it, that no army should be without its line of operation. There is, however, this difference that the line of operation of an army can seldom be changed after fighting has begun, whereas matters transpiring in the course of a trial, frequently disclose grounds of attack or defense imperceptible at its outset ; the seizing on which, and adapting them to the actual state of things, requires that "*ingenio veloci ac mobili, animo præsentis et acris*, which Quintilian in another place pronounces so essential to an advocate. (b) But the analogy is very close in one respect. The advocate, like the general, should always consider whether he is the attacking or defending party, and beware of undertaking the offensive, or of assuming the burden of proof, unless he is strong enough to do so. The violation of this principle is a very common, because very natural, fault in the defense of criminal cases. Oftentimes the only chance of escape is that the proof against the

(b) Quintil. Inst. Orat. lib. 6, c. 4.

accused may fall short, and all the energies of his advocate should be directed to show that it does. But if, abandoning this defensive attitude, he assumes the offensive—talks of the accused as an innocent man whom it is sought to oppress; denounces the prosecution as founded in spite, and the evidence by which it is supported as based on perjury; and fails, as without evidence or facts he must fail, in convincing the tribunal of this, the condemnation of his client follows as a matter of course.

**663.** The faculty of interrogating witnesses with effect, is unquestionably one of the arcana of the legal profession, and, in most instances at least, can only be attained after years of forensic experience. Cross-examination or examination *ex adverso*, is the most effective of all means for extracting truth; much perjured testimony is prevented by the dread of it; and few pleasures exceed that afforded, by witnessing its successful application in the detection of guilt or the vindication of innocence. In direct examination, although mediocrity is more easily attainable, it may be a question whether the highest degree of excellence is not even still more rare. For it requires mental powers of no inferior order so to interrogate each witness, whether learned or unlearned, intelligent or dull, matter of fact or imaginative, single-minded or designing, as to bring his story before the tribunal in the most natural, comprehensible, and effective form. Having in the present chapter endeavored to illustrate this important subject, we can not dismiss it without a caution. Maxims of every kind should be to us as guides—to shorten, as has been well observed, the turnings and windings of experience—not as stern masters to stifle the inspirations of genius; and the greatest advocate is he who, perfectly conversant with

the established rules of his art, knows when to break them, alike with safety and advantage.

<sup>1</sup> We subjoin David Paul Brown's "Golden Rules for the Examination of Witnesses":

"First, as to your own witnesses: I. If they are bold, and may injure your cause by pertness or forwardness, observe a gravity and ceremony of manner toward them, which may be calculated to repress their assurance. II. If they are alarmed or diffident, and their thoughts are evidently scattered, commence your examination with matters of a familiar character, remotely connected with the subject of their alarm, or the matter in issue, as for instance—Where do you live? Do you know the parties? How long have you known them? &c. And when you have restored them to their composure, and the mind has regained its equilibrium, proceed to the more essential features of the case, being careful to be mild and distinct in your approaches, lest you may again trouble the fountain from which you are to drink. III. If the evidence of your own witnesses be unfavorable to you (which should always be carefully guarded against), exhibit no want of composure; for there are many minds that form opinions of the nature or character of testimony chiefly from the effect which it may appear to produce upon the counsel. IV. If you perceive that the mind of the witness is imbued with prejudices against your client, hope but little from such a quarter; unless there be some facts which are essential to your client's protection, and which that witness alone can prove, either do not call him, or get rid of him as soon as possible. If the opposite counsel perceive the bias to which I have referred, he may employ it to your ruin. In judicial inquiries, of all possible evils, the worst and the least to be resisted is an enemy in the disguise of a friend. You can not impeach him—you can not cross-examine him—you can not disarm him—you can not indirectly, even, assail him; and if you exercise the only privilege that is left to you, and call other witnesses for the purposes of explanation, you must bear in mind, that instead of carrying the war into the enemy's country, the struggle is still between sections of your own forces, and in the very heart, perhaps, of your own camp. Avoid this, by all means. V. Never call a witness whom your adversary will be compelled to call. This will afford you the privilege of cross-examination—take from your opponent the same privilege it thus gives to you—and, in addition thereto not

only render everything unfavorable said by the witness doubly operative against the party calling him, but also deprive that party of the power of counteracting the effect of the testimony. VI. Never ask a question without an object, nor without being able to connect that object with the case, if objected to as irrelative. VII. Be careful not to put your question in such a shape that, if opposed for informality, you can not sustain it, or, at all events, produce strong reason in its support. Frequent failures in the discussions of points of evidence enfeeble your strength in the estimation of the jury, and greatly impair your hopes in the final result. VIII. Never object to a question from your adversary without being able and disposed to enforce the objection. Nothing is so monstrous as to be constantly making and withdrawing objections; it either indicates a want of correct perception in making them, or a deficiency of real or of moral courage in not making them good. IX. Speak to your witness clearly and distinctly, as if you were awake and engaged in a matter of interest; and make him also speak distinctly and to your question. How can it be supposed that the court and jury will be inclined to listen, when the only struggle seems to be whether the counsel or the witness shall first go to sleep? X. Modulate your voice as circumstances may direct—"Inspire the fearful and repress the bold." XI. Never begin before you are ready; and always finish when you have done. In other words, do not question for question's sake, but for an answer. Cross-Examination: I. Except in indifferent matters, never take your eye from that of the witness; this is a channel of communication from mind to mind, the loss of which nothing can compensate—

‘ Truth, falsehood, hatred, anger, scorn, despair,  
And all the passions—all the soul is there.’

II. Be not regardless, either, of the voice of the witness; next to the eye, this is perhaps the best interpreter of his mind. The very design to screen conscience from crime—the mental reservation of the witness—is often manifested in the tone or accent or emphasis of the voice. For instance, it becoming important to know that the witness was at the corner of Sixth and Chestnut streets at a certain time, the question is asked—Were you at the corner of Sixth and Chestnut streets, at six o'clock? A frank witness would answer, perhaps—I was near there. But a witness who had been there, desirous to conceal the fact, and to defeat your object, speaking to the letter rather than the spirit of the inquiry, answers—No;

although he may have been within a stone's throw of the place, or at the very place, within ten minutes of the time. The common answer of such a witness would be—I was not at the *corner*, at *six o'clock*. Emphasis upon both words plainly implies a mental evasion or equivocation, and gives rise, with a skillful examiner, to the question—At what hour were you at the corner, or at what place were you at six o'clock? And in nine instances out of ten, it will appear that the witness was at the place about the time, or at the time about the place. There is no scope for further illustrations—but be watchful, I say, of the voice, and the principle may be easily applied.

III. Be mild with the mild—shrewd with the crafty—confiding with the honest—merciful to the young, the frail, or the fearful—rough to the ruffian, and a thunderbolt to the liar. But in all this, never be unmindful of your own dignity. Bring to bear all the powers of your mind—not that you may shine, but that virtue may triumph, and your cause may prosper.

IV. In a criminal, especially in a capital, case, so long as your cause stands well, ask but few questions; and be certain never to ask any, the answer to which, if against you, may destroy your client, unless you know the witness perfectly well, and know that his answer will be favorable equally well; or unless you be prepared with testimony to destroy him, if he play traitor to the truth and your expectations.

V. An equivocal question is almost as much to be avoided and condemned as an equivocal answer; and it always leads to, or excuses, an equivocal answer. Singleness of purpose, clearly expressed, is the best trait in the examination of witnesses, whether they be honest or the reverse. Falsehood is not detected by cunning, but by the light of truth, or if by cunning, it is the cunning of the witness, and not of the counsel.

VI. If the witness determine to be witty or refractory with you, you had better settle that account with him at first, or its items will increase with the examination. Let him have an opportunity of satisfying himself either that he has mistaken your power or his own. But in any result, be careful that you do not lose your temper; anger is always either the precursor or evidence of assured defeat in every intellectual conflict.

VII. Like a skillful chess-player, in every move, fix your mind upon the combinations and relations of the game; partial and temporary success may otherwise end in total and remediless defeat.

VIII. Never undervalue your adversary, but stand steadily upon your guard; a random blow may be just as fatal as though it were directed by the most consummate skill; the negligence of one often cures, and sometimes

renders effective, the blunders of another. IX. Be respectful to the court and to the jury—kind to your colleague—civil to your antagonist; but never sacrifice the slightest principle of duty to an overweening deference toward either.”

In the “Code of Gentoo Laws, or Ordinations of the Pundits,” referred to, *ante*, p. 836, note 1, we find regulations concerning the etiquette of examining witnesses:

“He who means to question a witness, having bathed himself, shall put his questions in the tenth ghurrie of the day; the witness also, having bathed himself, and turned his face towards the eastern or northern quarter, shall deliver his evidence: the examiner shall ask the witness (if a Brahmin) with civility and respect, saying, ‘Explain to me what knowledge you have of this affair’; and to a Chehteree, he shall say, ‘What do you know of this affair? speak the truth’; and to a Bice, he shall say, ‘What do you know of this affair? if you give false evidence, whatever crime there is in stealing kine, or gold, or paddee, or wheat, or grām, or barley, or mustard, and such kind of grain, shall be accounted to you’; and to a Sooder, he shall say, ‘What do you know of this affair? speak; if your evidence is false, whatever crime is the greatest in the world, that crime shall be accounted to you.’”

And see also Mr. Reed’s valuable work, “Practical Suggestions for the Management of Lawsuits,” &c., N. Y., Cockcroft & Co., 1875; Cox’s “The Advocate: His Training, Practice, and Duties”; Dr. Warren’s “Law Studies,” &c.; above all, the seventh chapter of the fifth book of Quintilian’s Institutes of Oratory, “Of Witnesses.”





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